No. 16-32

Title:	Kindred Nursing Centers Limited Partnership, dba Winchester Centre for Health and Rehabilitation, nka Fountain Circle Health and Rehabilitation, et al., Petitioners v. Janis E. Clark, et al.
Docketed:	July 6, 2016
Linked with 15A1154	
Lower Ct:	Supreme Court of Kentucky
Case Nos.:	(2013-SC-000430-I, 2013-SC-000431-I)
Decision Date:	September 24, 2015
Rehearing Denied:	February 18, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 6 2016	Application (15A1154) to extend the time to file a petition for a writ of certiorari from May 18, 2016 to July 1, 2016, submitted to Justice Kagan.
May 9 2016	Application (15A1154) granted by Justice Kagan extending the time to file until July 1, 2016.
Jul 1 2016	Petition for a writ of certiorari filed. (Response due August 5, 2016)
Jul 29 2016	Order extending time to file response to petition to and including September 6, 2016.
Aug 5 2016	Brief amici curiae of American Health Care Association and The Kentucky Association of Health Care Facilities filed.
Aug 5 2016	Brief amici curiae of Genesis Healthcare, Inc, et al. filed.
Sep 6 2016	Brief of respondents Janis E. Clark, et al. in opposition filed.
Sep 20 2016	Reply of petitioners Kindred Nursing Centers Limited Partnership, dba Winchester Centre for Health and Rehabilitation, nka Fountain Circle Health and Rehabilitation, et al. filed.
Sep 21 2016	DISTRIBUTED for Conference of October 7, 2016.
Oct 4 2016	Rescheduled.
Oct 11 2016	DISTRIBUTED for Conference of October 14, 2016.
Oct 21 2016	Supplemental brief of petitioners Kindred Nursing Centers Limited Partnership, dba Winchester Centre for Health and Rehabilitation, nka Fountain Circle Health and Rehabilitation, et al. filed. (Distributed)
Oct 24 2016	DISTRIBUTED for Conference of October 28, 2016.
Oct 28 2016	Petition GRANTED.
Dec 7 2016	Joint appendix filed. (Statement of costs filed)
Dec 7 2016	Brief of petitioners Kindred Nursing Centers Limited Partnership, dba Winchester Centre for Health and Rehabilitation, nka Fountain Circle Health and Rehabilitation, et al. filed.
Dec 12 2016	Brief amici curiae of Genesis Healthcare, Inc, et al. filed.
Dec 14 2016	Brief amici curiae of American Health Care Association and The Kentucky Association of Health Care Facilities filed.
Dec 14 2016	Brief amicus curiae of The Chamber of Commerce of the United States of America filed.
Dec 22 2016	SET FOR ARGUMENT on Wednesday, February 22, 2017.

Dec 30 2016	Record requested from the Supreme Court of Kentucky.
Jan 6 2017	Brief of respondents Janis E. Clark, et al. filed.
Jan 11 2017	Record received from the Supreme Court of Kentucky, 1 Box.
Jan 13 2017	Brief amici curiae of American Association for Justice, and Kentucky Justice Association filed.
Jan 13 2017	Brief amicus curiae of Arbitration Scholar Imre S. Szalai filed.
Jan 13 2017	Brief amicus curiae of Public Citizen, Inc. filed.
Jan 13 2017	Brief amici curiae of AARP, et al. filed. (Distributed)
Jan 17 2017	Record received from the Court of Appeals of Kentucky (1 envelope).
Jan 17 2017	CIRCULATED.
Jan 19 2017	Supplemental brief of respondents Janis E. Clark, et al. filed. (Distributed)
Feb 6 2017	Reply of petitioners Kindred Nursing Centers Limited Partnership, dba Winchester Centre for Health and Rehabilitation, nka Fountain Circle Health and Rehabilitation, et al. filed. (Distributed)
Feb 22 2017	Argued. For petitioners: Andrew J. Pincus, Washington, D. C. For respondents: Robert E. Salyer, Lexington, Ky.
May 15 2017	Adjudged to be REVERSED IN PART, VACATED IN PART, and case REMANDED. Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, Alito, and Sotomayor, JJ., joined. Thomas, J., filed a dissenting opinion. Gorsuch, J., took no part in the consideration or decision of the case.
Jun 19 2017	JUDGMENT ISSUED.
Jun 19 2017	MANDATE ISSUED.
Aug 11 2017	Record from the Supreme Court of Kentucky has been returned.

~~Name~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~	~~Phone~~~~
Attorneys for Petitioners:		
Andrew J. Pincus Counsel of Record	Mayer Brown LLP 1999 K Street, NW Washington, DC 20006 apincus@mayerbrown.com	(202) 263-3000

Party name: Kindred Nursing Centers Limited Partnership, dba Winchester Centre for Health and Rehabilitation, nka Fountain Circle Health and Rehabilitation, et al.

Attorneys for Respondents:		
Robert E. Salyer Counsel of Record	Wilkes & McHugh, P.A. 429 North Broadway PO Box 1747 Lexington, KY 40588 rsalyer@wilkesmchugh.com	(859) 455-3356

Party name: Janis E. Clark, et al.

Other:		
Thomas R. McCarthy	Consovoy McCarthy Park PLLC 3033 Wilson Boulevard, Suite 700 Arlington, VA 22201 tom@consovoymccarthy.com	(703) 243-9423

Party name: The Chamber of Commerce of the United States of America

Donald L. Miller II
Quintairos Prieto Wood & Boyer PA
9300 Shelbyville Road, Suite 400
Louisville, KY 40222
dmiller@qpwblaw.com
(502) 423-6390

Party name: Genesis Healthcare, Inc, et al.

Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
snelson@citizen.org
(202) 588-1000

Party name: Public Citizen, Inc.

Robert S. Peck
Center for Constitutional Litigation P.C.
7916 Bressingham Drive
Fairfax Station, VA 22039
robert.peck@cclfirm.com
(202) 944-2874

Party name: American Association for Justice, and Kentucky Justice Association

William Alvarado Rivera
AARP Foundation Litigation
601 E Street, NW,
Washington, DC 20049
warivera@aarp.org
(202) 690-6229

Party name: AARP, et al.

James F. Segroves
Hooper, Lundy & Bookman, PC
401 Ninth Street, NW, Suite 550
Washington, DC 20004
jsegroves@health-law.com
(202) 580-7700

Party name: American Health Care Association and The Kentucky Association of Health Care Facilities

Imre S Szalai
Loyola University New Orleans College of Law
7214 St. Charles Avenue, Box 901
New Orleans, LA 70118
iszalai@loyno.edu
(504) 861-5589

Party name: Arbitration Scholar Imre S. Szalai

RECORD AND BRIEFS

16-32

No. 16-32

FILED
JUL 1 - 2016

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

The Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). That provision requires states to "place[] arbitration contracts 'on equal footing with all other contracts.'" *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468 (2015) (quoting *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006)).

The Supreme Court of Kentucky here refused to enforce the parties' arbitration agreements because it held that the attorneys-in-fact who signed those agreements lacked authority to enter into arbitration agreements—despite broad powers of attorney, including the power to make "contracts"—because those agreements waive a "divine God-given right" to a jury trial. App., *infra*, 43a. The court concluded that only an express mention of arbitration agreements in the power of attorney permits an attorney-in-fact to bind her principal to an arbitration agreement (*Ibid.*), even though Kentucky law does not require such an express mention of any other type of contract.

The question presented is:

Whether the FAA preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

RULE 29.6 STATEMENT

The parent corporations of Kindred Nursing Centers Limited Partnership are Kindred Nursing Centers East, LLC and Kindred Hospital Limited Partnership. The parent corporation of Kindred Nursing Centers East, LLC is Kindred Healthcare Operating, Inc.; and the parent corporations of Kindred Hospital Limited Partnership are Kindred Hospital West, LLC and Kindred Nursing Centers Limited Partnership. The parent corporation of Kindred Healthcare Operating, Inc. is Kindred Healthcare, Inc.

Kindred Healthcare, Inc. is a publicly traded corporation with no parent corporation. No publicly traded company owns 10% or more of the stock of Kindred Healthcare, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT 2
A. Factual Background 4
B. Proceedings Below. 5
REASONS FOR GRANTING THE PETITION 10
A. The Decision Below Conflicts With The FAA And Defies This Court's Precedents. 12
B. The Decision Below Is Exceptionally Important 17
CONCLUSION 23
APPENDIX A – The Kentucky Supreme Court's order denying rehearing (February 18, 2016) 1a
APPENDIX B – The Kentucky Supreme Court's opinion (September 24, 2015) 3a
APPENDIX C – The Kentucky Court of Appeals' order in *Clark* (June 25, 2013) ... 119a

TABLE OF CONTENTS
(continued)

Page

APPENDIX D – The Clark County Circuit Court's November 19, 2012 order in *Clark* 126a

APPENDIX E – The Clark County Circuit Court's January 9, 2012 order in *Clark* 128a

APPENDIX F – The Kentucky Court of Appeals' order in *Wellner* (June 25, 2013) 131a

APPENDIX G – The Clark County Circuit Court's November 19, 2012 order in *Wellner* 138a

APPENDIX H – The Clark County Circuit Court's January 9, 2012 order in *Wellner* 140a

TABLE OF AUTHORITIES

Page(s)

Cases

14 Penn Plaza LLC v. *Pyett*,
556 U.S. 247 (2009) 15

Allied-Bruce Terminix Cos. v. *Dobson*,
513 U.S. 265 (1995) 22, 23

AT&T Mobility LLC v. *Concepcion*,
563 U.S. 333 (2011) ..... *passim*

Brandenburg Health Facilities, LP v. *Mattingly*, No. 3:15-cv-00833
(W.D. Ky. June 20, 2016) 18

Button v. *Drake*,
195 S.W.2d 66 (Ky. 1946) 16

Circuit City Stores, Inc. v. *Adams*,
532 U.S. 105 (2001) 20

Citizens Bank v. *Alafabco, Inc.*,
539 U.S. 52 (2003) (per curiam) 22

DIRECTV, Inc. v. *Imburgia*,
136 S. Ct. 463 (2015) ..... *passim*

Doctor's Assocs., Inc. v. *Casarotto*,
517 U.S. 681 (1996) 3, 11, 12, 13

EEOC v. *Waffle House, Inc.*,
534 U.S. 279 (2002) 12

Estate of Smith v. *Southland Suites of Ormond Beach, LLC*,
28 So.3d 103 (Fla. Dist. Ct. App. 2010)
(per curiam) 19

TABLE OF AUTHORITIES—continued

Page(s)

GGNSC Louisville Hillcreek, LLC v. *Watkins*, 2016 WL 815295 (W.D. Ky. Feb. 29, 2016) 18

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 15

KPMG LLP v. *Cocchi*, 132 S. Ct. 23 (2011) (per curiam) 21, 22

Lancaster Med. Investors, LLC v. *Bates*, 2016 WL 3035686 (Ky. Ct. App. May 20, 2016) 19

Marmet Health Care Center, Inc. v. *Brown*, 132 S. Ct. 1201 (2012) 10, 11, 21, 22

Mitsubishi Motors Corp. v. *Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985) 15

Myers v. *GGNSC Holdings, LLC*, 2013 WL 1913557 (N.D. Miss. May 8, 2013) 19

Nitro-Lift Technologies, L.L.C. v. *Howard*, 133 S. Ct. 500 (2012) (per curiam) 11, 21

Owensboro Health Facilities, L.P. v. *Henderson*, 2016 WL 2853569 (W.D. Ky. May 13, 2016) 19

Perry v. *Thomas*, 482 U.S. 483 (1987) 3, 11, 12, 13

TABLE OF AUTHORITIES—continued

Page(s)

Pine Tree Villa, LLC v. *Coulter*,
2016 WL 3030185
(W.D. Ky. May 25, 2016) 18

Ping v. *Beverly Enterprises, Inc.*,
376 S.W.3d 581 (Ky. 2012) 6, 9, 10

Preferred Care of Delaware, Inc. v. *Crocker*,
2016 WL 1181786
(W.D. Ky. Mar. 25, 2016) 18

Preferred Care of Delaware v. *Quarles*,
No. 15-cv-177
(W.D. Ky. June 24, 2016) 18

Reynolds, Inc. v. *Byrd*,
470 U.S. 213 (1985) 22

Riney v. *GGNSC Louisville St. Matthews, LLC*, 2016 WL 2853568
(W.D. Ky. May 13, 2016) 18

Ritz-Carlton Development Co. v. *Narayan*,
136 S. Ct. 799 (2016) 23

Rivers v. *Roadway Express, Inc.*,
511 U.S. 298 (1994) 21

Schumacher Homes of Circleville, Inc. v. *Spencer*, 136 S. Ct. 1157 (2016) 23

Shearson/Am. Express, Inc. v. *McMahon*,
482 U.S. 220 (1987) 15

Stolt-Nielsen S.A. v. *AnimalFeeds Int'l Corp.*,
559 U.S. 662 (2010) 20

TABLE OF AUTHORITIES—continued

Page(s)

Constitutional Provisions and Statutes

U.S. const. art. VI, cl. 2 2

9 U.S.C. § 2 ..... 2, 3, 12, 13

28 U.S.C. § 1257(a) 2

Ky. Rev. Stat. § 216.510 5

PETITION FOR A WRIT OF CERTIORARI

Petitioners Kindred Nursing Centers Limited Partnership, *et al.* (collectively "Kindred") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Kentucky in these cases.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (App., *infra*, 3a-118a) is reported at 478 S.W.3d 306. The order of the Supreme Court of Kentucky denying rehearing (App., *infra*, 1a-2a) is unreported.

The following orders in *Clark* are all unreported: (1) the order of the Kentucky Court of Appeals denying interlocutory relief (App, *infra*, 119a-125a); (2) the November 15, 2012 order of the Circuit Court denying the motion to dismiss and compel arbitration (App., *infra*, 126a-127a); and (3) the January 9, 2012 order of the Clark County Circuit Court granting dismissal and compelling arbitration (App., *infra*, 128a-130a).

The following orders in *Wellner* are all unreported: (1) the order of the Kentucky Court of Appeals denying interlocutory relief (App, *infra*, 131a-137a); (2) the November 19, 2012 order of the Circuit Court denying the motion to dismiss and compel arbitration (App., *infra*, 138a-139a); and (3) the January 9, 2012 order of the Clark County Circuit Court granting dismissal and compelling arbitration (App., *infra*, 140a-142a).

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on September 24, 2015. App., *infra*, 3a.

That court denied rehearing on February 18, 2016. App., *infra*, 1a-2a. On May 9, 2016, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including July 1, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

The Kentucky Supreme Court refused to enforce two arbitration agreements entered into by attorneys-in-fact who had been given express authority to enter into "contracts" on behalf of their principals.

The court held that this general authority to enter into contracts did not authorize arbitration agreements. Instead, an explicit reference to arbitration in a power-of-attorney document is required to authorize an attorney-in-fact to enter into an arbitration contract, because such an agreement waives the principal's "sacred," "inviolate," and "God-given" right to a jury trial.

It is hard to imagine a more stark refusal to follow this Court's repeated instruction that the FAA "preclude[s] States from singling out arbitration provisions for suspect status." *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see also *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-69 (2015); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

The decision below does just that, by holding that a power of attorney authorizing an attorney-in-fact to enter into contracts authorizes entering into any kind of contract ***except*** an agreement to arbitrate. That approach cannot be squared with this Court's precedents, which hold that Section 2 of the FAA preempts state-law rules that are "restricted to [the] field" of arbitration and do not "place[] arbitration contracts on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 468-69 (quotation marks omitted); see also *Concepcion*, 563 U.S. at 339; *Casarotto*, 517 U.S. at 687; *Perry*, 482 U.S. at 492 n.9.

As one of the dissenting Justices below put it, the Kentucky Supreme Court's decision makes a "clever contribution to th[e] new genre" of state-court decisions seeking to evade this Court's precedents interpreting the FAA. App., *infra*, 99a (Abramson, J., dis-

senting). If the ruling below is permitted to stand, it could inspire other state courts to exhibit the same cavalier disregard of this Court's decisions and to announce rules of law that place obstacles in the way of enforcing arbitration agreements.

Indeed, *three* federal judges in Kentucky have already concluded that the Kentucky Supreme Court's explicit-reference rule is preempted by the FAA. These decisions are strong indication that the enforceability of a substantial number of arbitration agreements in Kentucky will depend entirely on whether the case is filed in, or can be removed to, federal court.

This Court's review is therefore essential. And given the clear failure of the lower court to heed this Court's repeated explanations that the FAA requires arbitration agreements to be placed on equal footing with other contracts, the Court may wish to consider summary reversal or vacatur for reconsideration in light of *Imburgia*.

A. Factual Background.

Petitioners Kindred Nursing Centers Limited Partnership, *et al.* (collectively "Kindred") operate nursing homes and rehabilitation centers, including the Winchester Centre for Health and Rehabilitation (a/k/a Fountain Circle Health and Rehabilitation). App., *infra*, 6a. Respondents Janis Clark and Beverly Wellner respectively represent the estates of Olive Clark and Joe Wellner, two former residents of the Winchester Centre.

Before the residents had been admitted to the Winchester Centre, they had executed powers of attorney designating respondents Clark and Wellner, respectively, as their attorneys-in-fact. These powers

of attorney conferred broad authority upon the attorneys-in-fact to enter into transactions and agreements relating to their principals' affairs.

Janis Clark's power of attorney, in pertinent part, conferred the power "[t]o draw, *make*, and sign in my name *any and all* checks, promissory notes, *contracts*, deeds or agreements; * * * and Generally to do and perform for me and in my name all that I might do if present." App., *infra*, 19a (emphasis added). Beverly Wellner's power of attorney authorized her to "*make, execute and deliver* deeds, releases, conveyances and *contracts of every nature* in relation to both real and personal property." *Id.* at 22a (emphasis added).

When their respective principals were admitted to the Winchester Centre, respondents signed the admission paperwork on their behalf. App., *infra*, 6a-7a. Each also executed a separate agreement titled "Alternative Dispute Resolution Agreement Between Resident and Facility (Optional)." *Id.* at 17a. This arbitration agreement provided that any disputes arising out of the "[r]esident's stay at the Facility" would be resolved in arbitration. *Ibid.* It also explained that "execution of this [arbitration] Agreement is not a precondition to the furnishing of services to the Resident by the Facility." *Ibid.*

B. Proceedings Below.

Respondents brought suit against petitioners, asserting state statutory and common-law claims arising out of their principals' deaths while residing at the Winchester Centre. Each respondent asserted causes of action for wrongful death, personal injury, and violations of Ky. Rev. Stat. § 216.510 *et seq.*, which enumerates various rights of long-term care

residents. App., *infra*, 17a, 20a. In each case, petitioners moved to dismiss or stay the lawsuits, seeking to enforce the arbitration agreements between petitioners and the residents. App., *infra*, 17a, 21a.

1. The state trial court initially dismissed each judicial action in favor of arbitration. App., *infra*, at 18a, 21a. Subsequently, the Supreme Court of Kentucky held in *Ping* v. *Beverly Enterprises, Inc.*, 376 S.W.3d 581, 592-94 (Ky. 2012), that a power of attorney expressly authorizing the attorney-in-fact to manage the principal's "financial affairs" and "health-care decisions" was limited to those express provisions, and did not include the authority to bind the principal to an optional arbitration agreement.[1]

Respondents moved for reconsideration of the dismissal orders. In each case, the trial court granted reconsideration and reversed its prior ruling, holding that the arbitration agreements were unenforceable because respondents lacked authority to bind their principals to arbitration. *Id.* at 18a, 21a.

2. Petitioner sought interlocutory review of both decisions in the Kentucky Court of Appeals. That court denied relief in both cases, holding that in light of *Ping*, respondents lacked authority under their powers of attorney to bind their principals to arbitration. App., *infra*, 19a-21a.

Petitioners then applied to the Supreme Court of Kentucky for interlocutory relief. *Id.* at 19a-20a, 23a. The state supreme court consolidated the two cases

---

[1] *Ping* did not have occasion to consider whether the broader powers of attorney at issue here—including documents that conferred express authority to make contracts—include the authority to enter into an arbitration agreement.

with a third case presenting similar issues, but involving a nursing home and rehabilitation facility that is not one of the petitioners.

3. A divided Supreme Court of Kentucky affirmed the Court of Appeals' orders denying interlocutory relief to compel arbitration, by a 4-3 vote.

The majority first considered whether the powers of attorney at issue appeared on their face to authorize the attorneys-in-fact to agree to arbitration on their principals' behalf. It held that the power of attorney in *Wellner* did not give such authorization. Although the *Wellner* power of attorney authorized the attorney-in-fact to make "contracts" related to "personal property," which the majority acknowledged includes legal claims, the majority concluded that an arbitration agreement does not "relate" to personal property, but rather solely to the principal's "constitutional right to access the courts and to trial by jury." App., *infra*, 37a.

The majority held that the *Clark* power of attorney *did* convey the necessary authority, concluding that in light of its broad language, "it would be impossible to say that entering into a pre-dispute arbitration agreement was not covered." *Id.* at 39a.

The majority then proceeded to consider, in *Clark* "as well as the other cases," the "extent to which the authority of an attorney-in-fact to waive his principal's fundamental constitutional rights to access the courts, to trial by jury, and to appeal to a higher court, can be inferred from a less-than-explicit grant of authority." App., *infra*, 40a. It held that only an express grant of authority to enter into arbitration agreements is sufficient to authorize an attorney-in-fact to agree to arbitration.

The majority opined that it would be "strange" to conclude that a general power of attorney authorized an attorney-in-fact to "waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude." App., *infra*, 42a. Equating contracts to arbitrate with these fundamental rights, the majority held that courts may not infer from a general power of attorney the authority to waive a principal's right to a jury trial. *Id.* at 43a.

The majority emphasized that the drafters of the Kentucky Constitution had "deemed the right to a jury trial to be *inviolate*, a right that cannot be taken away; and, indeed, a right that is *sacred*, thus denoting *that right and that right alone* as a divine God-given right." *Ibid.* (last emphasis added). The court thus concluded that an express grant of authority is needed before an attorney-in-fact can enter into an arbitration agreement on behalf of her principal.

The majority then "reject[ed] the notion" that its decision conflicted with the FAA or this Court's precedents. It described *Concepcion* as holding that state law is preempted when it "prohibits outright the arbitration of a particular type of claim" and explained that its ruling did not run afoul of that prohibition because arbitration agreements between nursing homes and residents could still be enforced as long as they were signed by the resident or an attorney-in-fact with explicit authority to enter into arbitration agreements. App., *infra*, 46a (quotation marks omitted). And the majority denied that its decision was "hostile" to arbitration, stating that its new rule

"merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights." *Id.* at 47a-48a.[2]

Chief Justice Minton and Justices Abramson and Noble dissented, with Justices Abramson and Noble each authoring a dissenting opinion.

The principal dissent, written by Justice Abramson and joined by the other two dissenting justices, observed that "[w]hether one sympathizes with the majority's dislike of federally imposed arbitration or not, the inescapable fact remains that the majority has disregarded controlling law" under the FAA and that the arbitration agreements must be enforced. App., *infra*, 99a (Abramson, J., dissenting).[3] Under the "clear precedent" of this Court, the dissent explained, the majority was "not at liberty to conclude that in Kentucky a power of attorney that gives the agent express authority to contract does not include

---

[2] The majority also took the opportunity to "reiterate" that the separate wrongful death claims brought by respondents were not within the scope of the arbitration agreements, because under Kentucky law a wrongful death claim does not belong to the decedent or derive from the decedent's claims and accordingly is not subject to an agreement to arbitrate the decedent's claims. App., *infra*, 8a-12a. The arbitrability of respondents' wrongful death claims was not challenged in the Kentucky Supreme Court (App., *infra*, 100a (Noble, J., dissenting)); nor is it at issue here.

[3] Justice Noble "join[ed] Justice Abramson's dissent for its reasoning on the main points in these cases," but separately dissented "to begin correcting any confusion about agency law by the part of our *Ping* decision that was actually not determinative in the result of the case." App, *infra*, 116a. Unless otherwise noted, references to the "dissent" refer to Justice Abramson's dissenting opinion.

the authority to contract for arbitration * * * ." *Id.* at 78a. In the dissent's view, the majority's holding "fl[ies] in the face of federal law and [is] preempted by the Supremacy Clause because it [is] clearly not * * * a state-law principle applicable to 'any contract' but rather one that singles out arbitration agreements for disfavored treatment." *Ibid.*

The dissent also explained that the majority's express-statement rule did *not* reflect a generally-applicable ground for the revocation of any contract. Rather, "the majority's specific-authorization requirement burdens agent-entered arbitration agreements more heavily than * * * agent-entered contracts generally," thus running afoul of the FAA's requirement that arbitration agreements "be placed upon the same footing as other contracts." App., *infra*, 92a (quotation marks omitted). Accordingly, the dissent continued, the Kentucky court's new rule was "in the same vein as the statutes and judicially-created rules stricken by" this Court, such as West Virginia's anti-arbitration rule involving nursing home admission agreements that was declared preempted in *Marmet Health Care Center, Inc.* v. *Brown*, 132 S. Ct. 1201 (2012). App., *infra*, 78a.

REASONS FOR GRANTING THE PETITION

The decision below defies this Court's clear and repeated holdings that the FAA preempts state-law rules that discriminate against arbitration agreements. By requiring that a power of attorney contain an explicit statement authorizing the attorney-in-fact to enter into an arbitration agreement—even though Kentucky law does not impose that requirement for other types of contracts—the court below flatly violated the FAA's mandate that courts must "place[] arbitration agreements on equal footing with

all other contracts." *Imburgia*, 136 S. Ct. at 468; see also *Casarotto*, 517 U.S. at 686-87; *Perry*, 482 U.S. at 492 n.9.

The Kentucky court defended its rule as one of general applicability—claiming that it would require express authority before an attorney-in-fact could waive any constitutional right of the principal. But even a cursory reading of its decision reveals that the *only* right to which the court's reasoning applies is the right to a jury trial—the waiver of which, not coincidentally, is the most defining characteristic of an arbitration agreement. Thus, the Kentucky court's rule is a contract defense that specifically targets arbitration agreements and is accordingly preempted by the FAA.

Indeed, an unbroken line of decisions by *federal* courts in Kentucky has already held just that. Not only are those federal courts correct, but the clear conflict between the state and federal courts of Kentucky means that a party's rights under the FAA currently turn entirely on whether the lawsuit is in state or federal court.

The decision below is yet another in a long line of state court decisions seeking to evade this Court's precedents on arbitration. See, *e.g.*, *Imburgia*, 136 S. Ct. 463; *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam); *Marmet*, 132 S. Ct. 1201. As Justice Abramson observed in dissent, the decision makes "a clever contribution to this new genre" of recent cases that have attempted "to 'rule around' the FAA." App., *infra*, 99a (Abramson, J., dissenting). Review and reversal or vacatur of the decision below is warranted to underscore that such end-runs are intolerable and to preserve the integrity of this Court's precedents.

A. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

The Kentucky Supreme Court's rule requiring specific language in a power of attorney that expressly authorizes attorneys-in-fact to enter into arbitration agreements cannot be squared with the plain terms and manifest purpose of the FAA.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted).

Section 2 of the FAA therefore commands that "[a]n agreement to arbitrate is valid, irrevocable, and *enforceable as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry*, 482 U.S. at 492 n.9 (quoting 9 U.S.C. § 2). This principle means that "Congress precluded States from singling out arbitration provisions for suspect status" (*Casarotto*, 517 U.S. at 687) or from invalidating arbitration provisions through state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339; see also *Imburgia*, 136 S. Ct. at 469; *Perry*, 482 U.S. at 492 n.9. Nor may States apply generally applicable state-law doctrines "in a

fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341.[4]

The Kentucky Supreme Court committed these very transgressions here.

In both cases, an attorney-in-fact for the resident had been granted authority to enter into "contracts" on the resident's behalf. App., *infra*, 19a, 22a. But the majority below nonetheless held that those attorneys-in-fact lacked authority to enter into arbitration agreements—but not *other* kinds of contracts—because the power of attorney did not specifically mention arbitration agreements. This explicit-reference rule clearly "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity." *Casarotto*, 517 U.S. at 688.

Indeed, the Kentucky rule here is indistinguishable from the Montana rule at issue in *Casarotto*, which required contracts with arbitration clauses to provide notice of the clauses in underlined capital letters on the first page of the contract. That heightened-notice requirement "directly conflict[ed] with § 2 of the FAA because the State's law condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." 517 U.S. at 687.

The Kentucky Supreme Court's rule likewise impermissibly conditions the enforceability of arbitration agreements signed by attorneys-in-fact on an

---

[4] It is immaterial that the discriminatory rule here derives from common law rather than a statute; the FAA preempts any "state law, whether of legislative *or judicial* origin," that disfavors arbitration. *Perry*, 482 U.S. at 492 n.9 (emphasis added); see *Casarotto*, 517 U.S. at 687 n.3.

explicit-reference requirement not applicable to other kinds of contracts. See also App., *infra*, 78a (Abramson, J., dissenting) (noting that the majority's rule requiring an explicit mention of arbitration "singles out arbitration agreements for disfavored treatment in the same vein as the statutes and judicially-created rules" that this Court has previously held preempted by the FAA).

It makes no difference that the majority below described its rule as an application of the "general principle[] * * * that an attorney-in-fact may not act beyond the powers he has been granted under the power-of-attorney instrument." App., *infra*, 45a. A rule based on generally-applicable contract doctrines is still preempted when that rule is "applied in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341. And there can be no doubt that the majority's explicit-reference rule disfavors arbitration: as the dissent below explained, the rule "burdens agent-entered arbitration agreements more heavily than either agent-entered contracts generally, or judicial forms of agent-initiated dispute resolution." App., *infra*, 92a (Abramson, J., dissenting).

Likewise unavailing is the majority's rationale that its explicit-reference rule does not disfavor arbitration because the rule applies to all "fundamental constitutional rights." *Id.* at 48a. The majority's own opinion reveals that its assertion is inaccurate. The majority describes the right to a jury trial as the one and only "sacred" constitutional right in Kentucky. *Id.* at 43a ("[T]he drafters of our Constitution deemed the right to a jury trial * * * ***and that right alone*** as a divine God-given right." (emphasis added)). There is nothing in the majority opinion to suggest that its reasoning would apply to any waiver of

a constitutional right *other* than the right to a jury trial—"*the one right that just happens to be correlative to the right to arbitrate.*" *Id.* at 95a (Abramson, J., dissenting).

Moreover, as Justice Abramson rightly noted, attorneys-in-fact in Kentucky "routinely exercise, compromise, and waive fundamental constitutional rights on behalf of their principals"—such as the right to acquire and dispose of property. App., *infra*, 92a (Abramson, J., dissenting). Thus, it is clear that the majority's explicit-reference rule does not actually apply to *all* constitutional rights—if it did, it would "revolutionize[]" the law of agency in Kentucky. App., *infra*, 94a.

The majority "ma[d]e plain the hostility to arbitration" (App., *infra*, 96a (Abramson, J., dissenting)) that underlies its holding when it reasoned that agreeing to arbitration on behalf of a principal is comparable to binding the principal to "personal servitude"; terminating "the principal's parental rights"; "put[ting] her child up for adoption"; or stripping the principal of her "right to worship freely" (App., *infra*, 42a). These inflammatory and inaccurate analogies reflect precisely the type of hostility to arbitration as a means of dispute resolution that this Court has repeatedly declared out of bounds under the FAA. See, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 266 (2009); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991); *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 231-32 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

In any event, even if the majority's explicit-reference rule did apply to such constitutional rights as the right to "worship freely" or the right against

involuntary "personal servitude," the majority would still be resting on a false equivalence. Those rights are "rights that an ordinary attorney-in-fact is rarely, if ever, asked to address on the principal's behalf." *Id.* at 96a (Abramson, J., dissenting). By contrast, arbitration agreements "are commonplace." *Ibid.* Thus, as Justice Abramson summarized, "the application of [the explicit-reference] rule will clearly have a disproportionate effect on the ability of agents to enter arbitration agreements (as opposed to other contracts)." *Id.* at 97a. This "disproportionate impact" is impermissible under the FAA. See *Concepcion*, 563 U.S. at 342.

In one of the two cases, *Wellner*, the majority identified a second reason for refusing to enforce the arbitration agreement. Even though the *Wellner* power of attorney authorized the attorney-in-fact to make contracts "'*in relation to * * * personal property*,'" App., *infra*, 22a—and the majority "certainly agree[d]" that "personal injury claim[s]" and other "'choses-in-action are personal property'" *Id.* at 36a (quoting *Button* v. *Drake*, 195 S.W.2d 66, 69 (Ky. 1946))—the majority nonetheless held the power to agree to arbitration outside the scope of the attorney-in-fact's authority. Instead, the majority said, an agreement to arbitrate the principal's legal claims somehow did not "relat[e] to" the claims, but rather solely to the principal's "constitutional right" to trial by jury, which is not "personal property." *Id.* at 37a.

This conclusion is not only nonsensical but also is preempted by the FAA, because the reasoning would not apply to any agreement other than an agreement to arbitrate. That is precisely what this Court concluded in *Imburgia*, holding that the FAA preempted the California Court of Appeal's interpretation of the

term "law of your state" because "nothing in the [state court's] reasoning suggest[ed]" that a court in that state "would reach the same interpretation of 'law of your state' in any context other than arbitration." 136 S. Ct. at 470-71. Likewise, nothing in the lower court's reasoning suggests that a Kentucky court would interpret the term "contracts * * * in relation to * * * personal property," App., *infra*, 22a, to exclude contracts affecting legal claims that do not involve arbitration.

B. The Decision Below Is Exceptionally Important.

This Court's intervention is warranted for three basic reasons.

1. This issue arises with great frequency. Many nursing home residents' admission-related agreements are signed by attorneys-in-fact—because residents often suffer from physical or mental limitations that make it easier to delegate handling of such matters to a family member or other trusted individual. And many nursing homes provide the option of resolving disputes via arbitration. See App, *infra*, 44a (recognizing that "arbitration clauses are commonplace" in this context).

2. There is a square conflict between the ruling below and decisions on the very same legal issue by the federal district courts in Kentucky—a conflict that produces significant unfairness to litigants, such as petitioners, that are unable to remove cases from state to federal court.

Three different federal district judges in Kentucky have held that the state-law rule announced by

the decision below is preempted by the FAA.[5] See Memorandum Opinion and Order at 9, *Brandenburg Health Facilities, LP* v. *Mattingly*, No. 3:15-cv-00833 (W.D. Ky. June 20, 2016) ("[T]he Court will not apply *Whisman* to the extent that it conflicts with U.S. Supreme Court precedent by treating an agreement to arbitrate differently than any other contract.") (footnote omitted); *Pine Tree Villa, LLC* v. *Coulter*, 2016 WL 3030185, at *3 n.1 (W.D. Ky. May 25, 2016) ("*Whisman* is inconsistent with federal law. * * * Justice Abramson's dissenting opinion is more consistent with federal law."); *Owensboro Health Facilities, L.P.* v. *Henderson*, 2016 WL 2853569, at *4 (W.D. Ky. May 13, 2016) ("Kentucky's requirement that a power of attorney explicitly enumerate an attorney-in-fact's power to sign an arbitration agreement violates the FAA") (quotation marks omitted); *Riney* v. *GGNSC Louisville St. Matthews, LLC*, 2016 WL 2853568, at *3 (W.D. Ky. May 13, 2016) (same); *GGNSC Louisville Hillcreek, LLC* v. *Watkins*, 2016

---

[5] A fourth judge likewise concluded that "Kentucky's requirement that a power of attorney explicitly enumerate an attorney-in-fact's power to sign an arbitration agreement violates the FAA." *Preferred Care of Delaware, Inc.* v. *Crocker*, 2016 WL 1181786, at *9 (W.D. Ky. Mar. 25, 2016). Without retreating from that conclusion, the court subsequently vacated its decision on *res judicata* grounds because a Kentucky state court—in a parallel action involving the same parties in interest and the same underlying claims—had applied the decision below to declare the arbitration agreement unenforceable, and issued that ruling before the federal court rendered its decision enforcing the arbitration agreement. See Memorandum Opinion at 5-7, *Preferred Care of Delaware* v. *Quarles*, No. 15-cv-177 (W.D. Ky. June 24, 2016), ECF No. 73. The outcome in *Crocker* serves only to highlight the square conflict between Kentucky's state and federal courts on this issue and invites parties resisting arbitration to race to the state courts.

WL 815295, at *5 n.3 (W.D. Ky. Feb. 29, 2016) ("Justice Abramson's dissenting opinion is more consistent with applicable federal law than the majority opinion.").[6]

This conflict between Kentucky's state and federal courts will lead to distortions in the marketplace.

Armed with the ruling below, Kentucky plaintiffs will bring similar lawsuits in state court, and petitioners and other companies domiciled in Kentucky will be unable to remove those cases to federal court. And it is clear that the Kentucky state courts will not enforce arbitration agreements in those cases. See, *e.g.*, *Lancaster Med. Investors, LLC* v. *Bates*, 2016 WL 3035686, at *1, 3 (Ky. Ct. App. May 20, 2016) (refusing to enforce an arbitration agreement despite language in a power of attorney authorizing the attorney-in-fact to do "all that [the principal] might do if present").

But competitors that are headquartered or incorporated elsewhere will be able to remove such cases to federal court and enforce their arbitration agree-

---

[6] The holding below is also in conflict with decisions from other jurisdictions, which have reached the common-sense conclusion that the authorization to make "contracts" in a power of attorney necessarily includes the authorization to enter into an arbitration agreement. See *Myers* v. *GGNSC Holdings, LLC*, 2013 WL 1913557, at *5 (N.D. Miss. May 8, 2013) (enforcing arbitration provision entered into by attorney-in-fact with authorization to perform "the making of contracts"); *Estate of Smith* v. *Southland Suites of Ormond Beach, LLC*, 28 So.3d 103, 104 (Fla. Dist. Ct. App. 2010) (per curiam) (same result where power of attorney "did not specifically reference arbitration agreements," but gave attorney-in-fact the power to "make, execute, and acknowledge all contracts") (emphasis omitted).

ments—thereby allowing those companies (and the plaintiffs) "to realize the benefits of private dispute resolution," including "lower costs" and "greater efficiency and speed." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010); see also, *e.g.*, *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation * * * ."). That dichotomy places Kentucky businesses at a distinct disadvantage in the marketplace.

The circumstances here are therefore similar to those that warranted this Court's review in *Imburgia*. See 136 S. Ct. at 467-48 (observing that the petition granted "not[ed] that the Ninth Circuit had reached the opposite conclusion on precisely the same interpretive question decided by the California Court of Appeal"). This Court's intervention is needed in order to ensure that parties' rights in Kentucky under the FAA do not depend on the forum—state or federal court—in which they seek to enforce an arbitration agreement.

Moreover, if left unchecked, the ruling below will encourage further litigation on this issue in other jurisdictions. It opens the door for other courts to adopt conflicting interpretations of similar (or identical) contracts, thus undermining the national policy favoring arbitration.

3. This Court's intervention also will make clear that lower courts may not invalidate arbitration agreements in contravention of the FAA and this Court's precedents.

This Court repeatedly has intervened by granting summary reversals when state courts have ignored or refused to apply controlling precedents in-

terpreting the FAA. As the Court has explained, because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 133 S. Ct. at 501.

Thus, for example, in *Marmet*, this Court summarily vacated and remanded a decision of "the Supreme Court of Appeals of West Virginia," which, "by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing th[e] basic principle" that both "[s]tate and federal courts must enforce the Federal Arbitration Act." 132 S. Ct. at 1202; see also *id.* at 1203 ("The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.").

In *Nitro-Lift*, this Court summarily vacated the Oklahoma Supreme Court's decision refusing to apply this Court's severability doctrine and instead declaring the underlying contract containing the arbitration provision null and void—a decision which blatantly "disregard[ed] this Court's precedents on the FAA." 133 S. Ct. at 503. The Court further reminded lower courts that "'[i]t is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'" *Ibid.* (quoting *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)).

In *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam), this Court summarily vacated the Florida District Court of Appeal's refusal to compel arbitration as "fail[ing] to give effect to the plain meaning of the [Federal Arbitration] Act and to the hold-

ing of *Dean Witter* [*Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985)]."

And in *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam), this Court summarily reversed the Alabama Supreme Court's refusal to apply the FAA based on an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's decision in *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995).

As Justice Abramson's powerful dissent—joined by two other justices—makes clear, a similar disregard of this Court's precedents is afoot in Kentucky. This Court should respond, just as it did in *Marmet*, *Nitro-Lift*, *KPMG*, and *Citizens Bank*.

In addition, earlier this term, this Court reversed a decision of the California Court of Appeal adopting a dubious interpretation of an arbitration agreement in an attempt to find the agreement unenforceable. *Imburgia*, 136 S. Ct. at 468-71. This Court was once again compelled to remind the lower courts of their "undisputed obligation" to follow its precedents: "The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *Id.* at 468.

The decision below indicates that in some state courts, this Court's admonitions have fallen on deaf ears. Left to stand, the decision below could well prompt other state courts to manufacture interpretations of state contract law that single out arbitration for disfavored treatment in an effort to circumvent the FAA and this Court's precedents. This Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as

authority." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). That reliance on a uniform national policy favoring arbitration (one embodied by the FAA) would be replaced with an uneven patchwork of "one-off," unprincipled carve-outs from the FAA that differ from state to state.

* * * *

Given the clear conflict between the decision below and this Court's precedents, the Court may wish to consider summarily reversing the decision below.

If the Court believes that neither plenary review nor summary reversal is warranted, it may wish to consider granting, vacating, and remanding the decision below in light of *Imburgia*.[7] This Court has already taken that course in other cases presenting state courts' refusal to adhere to this Court's precedents interpreting the FAA. See *Schumacher Homes of Circleville, Inc.* v. *Spencer*, 136 S. Ct. 1157 (2016); *Ritz-Carlton Development Co.* v. *Narayan*, 136 S. Ct. 799 (2016). Doing the same here would remind the Kentucky Supreme Court that it may not adopt rules of contract interpretation that disfavor arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary

---

[7] The decision below was issued before *Imburgia*, but it became final when the Kentucky Supreme Court denied rehearing approximately two months after *Imburgia* was decided. Nonetheless, there is no indication from the Kentucky court's summary denial of rehearing (App, *infra*, 1a-2a) that the court addressed whether its holding was in accord with *Imburgia*. Indeed, for all of the reasons explained *supra*, it was not.

reversal, or vacatur for reconsideration in light of *Imburgia*.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

JULY 2016

APPENDICES

APPENDIX A

SUPREME COURT OF KENTUCKY

FEBRUARY 18, 2016 MINUTES

RELEASED: 10:00 A.M.

COURT ORDERS DENYING PETITION FOR REHEARING- FEBRUARY 18, 2016

JULIUS WALLACE V. COMMONWEALTH OF KENTUCKY **ALL SITTING. ALL CONCUR.**	2013-SC-000332-MR	JEFFERSON
GREGORY WILSON V. COMMONWEALTH OF KENTUCKY **ORDER MODIFIED THE OPINION OF THE COURT RENDERED OCTOBER 29,2015, BY SUBSTITUTION OF THIS OPINION IN LIEU OF THE ORIGINAL OPINION.** ALL SITTING. ALL CONCUR.	2013-SC-000423-MR 2013-SC-000483-MR **NOT TO BE PUBLISHED**	KENTON
EXTENDICARE HOMES, INC., ETC., ET AL. V. BELINDA WHISMAN AND TONY ADAMS, ETC. **ALL SITTING. ALL CONCUR.**	2013-SC-000426-1	TRIGG
KINDRED NURSING	2013-SC-	CLARK

CENTERS LIMITED PARTNERSHIP, ETC.,ET AL. V. JANIS E. CLARK, ETC.	000430-1	
KINDRED NURSING CENTERS LIMITED PARTNERSHIP, ETC.,ET AL. V. BEVERLY WELLNER, ETC.	2013-SC-000431-1	CLARK
JEREMY BREWER V. COMMONWEALTH OF KENTUCKY ALL SITTING. ALL CONCUR.	2013-SC-000467-DG	FAYETTE
JAMES OVERSTREET, ETC. V. KINDRED NURSING CENTERS LIMITED PARTNERSHIP, ETC., ET AL. ALL SITTING. ALL CONCUR.	2013-SC-000620-DG	MERCER

APPENDIX B

RENDERED: SEPTEMBER 24, 2015
TO BE PUBLISHED
SUPREME COURT OF KENTUCKY

2013-SC-000426-I

EXTENDICARE HOMES, INC. D/B/A SHADY LAWN NURSING HOME; EXTENDICARE, INC.; EXTENDICARE HEALTH NETWORK, INC.; EXTENDICARE REIT; EXTENDICARE L.P.; EXTENDICARE HOLDINGS, INC.; EXTENDICARE HEALTH SERVICES, INC. EXTENDICARE HEALTH FACILITY HOLDINGS, INC.; JOHN DOES 1 THROUGH 5; AND UNKNOWN DEFENDANTS

MOVANTS

v.

ON REVIEW FROM COURT OF APPEALS

CASE NO. 2012-CA-001936-I

TRIGG CIRCUIT COURT NO. 12-CI-00100

BELINDA WHISMAN AND TONY ADAMS, AS CO-ADMINISTRATORS OF THE ESTATE OF VAN B. ADAMS, DECEASED

RESPONDENTS

AND

2013-SC-000430-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A WINCHESTER CENTRE

FOR HEALTH AND REHABILITATION N/K/A FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; AND KINDRED HEALTHCARE OPERATING, INC.

MOVANTS

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2012-CA-002113-I
CLARK CIRCUIT COURT NO. 10-CI-00469

JANIS E. CLARK, EXECUTRIX OF THE ESTATE OF OLIVE G. CLARK, DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF OLIVER G. CLARK,

AND

2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; AND KINDRED HEALTH CARE OPERATING, INC.

MOVANTS

v.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2012-CA-002112-I

CLARK CIRCUIT COURT NO. 10-CI-00472

BEVERLY WELLNER, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF JOE P. WELLNER, DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF JOE P. WELLNER

RESPONDENTS

OPINION. OF THE COURT BY JUSTICE VENTERS DENYING INTERLOCUTORY RELIEF

This decision consolidates three cases accepted by this Court for discretionary review pursuant to CR 65.09. By way of motions for interlocutory relief under CR 65.09, Extendicare Homes, Inc. d/b/a/ Shady Lawn Nursing Home ("Extendicare"), and its affiliated entities,[1] and Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre For Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation ("Kindred") and its affiliated entities,[2] seek relief from orders of the Court of Appeals refusing to compel arbitration of disputes pending in Clark Circuit Court and the Trigg Circuit Court.

Each of the three cases originated with the filing of an action in the circuit court asserting claims against the nursing home for personal injuries suffered by the nursing home resident, violations of KRS 216.510 *et seq.*,[3] and for wrongful death of the resident. In each case, at the time of the resident's admission to the nursing home, an attorney-in-fact for the resident executed a written document provid-

---

[1] Extendicare, Inc.; Extendicare Health Network, Inc.; Extendicare Reit; Extendicare L.P.; Extendicare Holdings, Inc.; Extendicare Health Services, Inc.; Extendicare Health Facility Holdings, Inc.; John Does 1 Through 5; and Unknown Defendants.

[2] Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; and Kindred Health Care Operating, Inc.

[3] KRS 216.515 enumerates certain enforceable rights extended to nursing home residents.

ing that any claims or disputes arising out of the relationship between the resident and the nursing home would be submitted to arbitration, rather than adjudication in the courts. Upon the commencement of each case in circuit court, the defendant nursing home facility moved the court to dismiss the action and compel the parties to submit the claims to a formal arbitration proceeding. In each case, citing our opinion in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), *cert. denied,* 134 S.Ct. 705, 187 L.Ed.2d 567 (2013), the circuit court denied the motion on the grounds that the respective power-of-attorney instruments did not authorize the resident's attorney-in-fact to waive the resident's right to access to the courts for the resolution of disputes.

Kindred and Extendicare each sought interlocutory relief in the Court of Appeals pursuant to CR 65.07. The Court of Appeals declined to grant the requested relief. Kindred and Extendicare then sought relief in this Court.

The central issue is whether, based upon the language of the particular power-of-attorney instrument, an arbitration agreement was validly formed between the respective nursing home facility and the resident whose interests were thereby affected. For the reasons set forth below, we conclude in two of the cases, *Extendicare Homes, Inc., et al, v. Whisman* (Case No. 2013-SC-426-I) and *Kindred Nursing Centers Limited Partnership, et al., v. Wellner* (Case No. 2013-SC-431-I), that the authority to enter into a pre-dispute arbitration agreement was not among the powers granted to respective attorney-in-fact and, therefore the arbitration agreements were not formed with the assent of the party to be bound thereby. Lacking the essential element of assent, we

conclude that the arbitration agreements in those cases were never validly formed.

We further conclude that without a clear and convincing manifestation of the principal's intention to do so, we will not infer the delegation to an agent of the authority to waive a fundamental personal right so constitutionally revered as the "ancient mode of trial by jury."[4] Consequently, because none of the power-of-attorney instruments involved in these cases provide a manifestation of the principal's intent to delegate that power to his agent, we conclude that the agent was not so authorized, and that the principal's assent to the waiver was never validly obtained. Accordingly, we deny the motions for interlocutory relief. In so doing, we affirm the orders of the Court of Appeals.

At the outset, however, it is appropriate that we direct our attention specifically to the cause of action pled in each case for wrongful death. We held in *Ping*, and we reiterate today: the decedent whose death becomes the basis of a wrongful death claim had no authority during his lifetime, directly or through the actions of his attorney-in-fact, to prospectively bind the beneficiaries of the wrongful death claim to an arbitration agreement.

I. THE WRONGFUL DEATH BENEFICIARIES ARE NOT BOUND BY THE ARBITRATION AGREEMENTS IN ISSUE HERE

In *Ping*, 376 S.W.3d at 597-600, we squarely confronted the question of whether a decedent, by her own action or through the action of her attorney-in-fact, could enter into contracts of any kind that

---

[4] Ky. Const. § 7.

would bind the rights of the beneficiaries of wrongful death claims made in connection with her own death. Based upon well-settled precedent and upon the constitutional and statutory structure of Kentucky's wrongful death law, we determined that a wrongful death claim does not "derive from any claim on behalf of the decedent, and [the wrongful death beneficiaries] do not succeed to the decedent's dispute resolution agreements." *Id.* at 600.

Section 241 of the Kentucky Constitution declares: "The General Assembly may provide how the recovery [from a wrongful death action] shall go and to whom belong." In KRS 411.130(2), the General Assembly designated the persons to whom such claims belong. In *Ping*, we quoted *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 672 (Ky. 1967), holding that "the wrongful death action is not derivative...[It] is distinct from any [cause] that the deceased may have had if he had survived." *Id.* We recently reaffirmed that holding in *Pete v. Anderson:*

> Under the plain language of the statute, the cause of action `belongs' to the beneficiaries of the wrongful death claim, as the amount recovered in a wrongful death action 'shall be for the benefit of and go to the kindred of the deceased[.]' KRS 411.130(2)....With no interest in the recovery, the personal representative is a "nominal" party, as the 'real parties in interest are the beneficiaries whom [the personal representative] represents.'" (citing *Vaughn's Administrator*, 179 S.W.2d 441, 445. (1944)).

413 S.W.3d 291, 299 (Ky. 2013). Moreover, *Pete* expressly and explicitly noted that "*Ping*...puts to rest any dispute as to whether the statutory beneficiaries are the real parties in interest to a wrongful death action." *Pete*, at 300.

Under Kentucky law, a wrongful death claim is a distinct interest in a property right that belongs *only* to the statutorily-designated beneficiaries. Decedents, having no cognizable legal rights in the wrongful death claims arising upon their demise, have no authority to make contracts disposing of, encumbering, settling, or otherwise affecting claims that belong to others. The rightful owners of a wrongful death claim, the beneficiaries identified in KRS 411.130(2), cannot be bound to the contractual arrangements purportedly made by the decedent with respect to those claims.[5] A decedent has no more authority to bind the wrongful death beneficiaries to an arbitration agreement than he has to bind them to a settlement agreement fixing or limiting the damages to be recovered from the wrongful death action, limiting the persons against whom a claim could be pursued, or an agreement on how and to whom to allocate the damages recovered in a wrongful death claim.[6] Our analysis in *Ping* was

---

[5] *See McWethy's Adm'x v. McCright*, 133 S.W. 1001, 1002 (1911) ("A child has no interest in property of the parent while the latter is living; and this court has frequently held that the child cannot incumber [sic], sell, or otherwise dispose of a mere expectancy in the estate of the parent.").

[6] We note here, as we did in *Ping*, that it is of no consequence that the person signing the arbitration agreement *in her representative capacity as attorney-in-fact*, is individually, one of the statutorily-designated wrongful death beneficiaries. By explicitly signing in that representative capacity, the agent does not

thorough, complete, correct, and unanimous. We reaffirmed it in *Pete* and we have no reason to retreat from it now.[7]

In contrast with the wrongful death claims, the personal injury and statutory claims arising under KRS 216.510 *et seq.* belong to the decedents; and the respective estates succeeded to those claims, at least

---

bind herself, personally, to the terms of the agreement, and care must be taken not to "conflate" the two distinct entities involved. *See Ping*, 376 S.W.3d at 599 ("By executing the arbitration contract, Ms. Ping purported to agree on her mother's behalf, not her own, to arbitrate her mother's claims. Even were her mother's agreement valid, Ms. Ping's having executed it as her mother's representative would not preclude Ms. Ping, as representative of the wrongful death beneficiaries, from litigating their entirely separate claim.").

[7] We are aware that at least one federal trial judge takes issue with our analysis in *Ping*. *See Golden Gate Nat. Senior Care, LLC v. Addington*, 14-CV-327-JMH, 2015 WL 1526135, at *8-9 (E.D. Ky. Apr. 3, 2015). The judge in that case contends that *Ping's* holding with respect to the rights of the wrongful death beneficiaries is wrong because it "effectively nullif[ies] arbitration in the wrongful death context" and runs counter to *Marmet Health Care Center, Inc. et al v. Clayton Brown et al.* — *U.S.* __, __, 132 S.Ct. 1201, 1203, (2012) and *Marmet's* "emphatic federal policy in favor of arbitral dispute resolution" and concludes that the FAA "includes no exception for personal-injury or wrongful-death claims." The fallacy of that position is obvious: 1) arbitration agreements in wrongful death cases are not nullified because wrongful death beneficiaries are free, as they always have been, to enter into arbitration agreements regarding their wrongful death claims; and 2) as we explained in *Ping*, the ownership status of a wrongful death varies from state to state depending upon the statutory and constitutional provisions that create the right. *Ping*, at 598. The federal and state policies favoring arbitration do not displace well-settled principles of contracts, property, and due process that bar individuals from making contracts that dispose of rights and property interests belonging to other people.

to the extent that such claims survive the decedent's death pursuant to KRS 411.140[8] and 216.515(26).[9] We now redirect our attention to those claims, to determine based on *Ping* and other applicable law, whether the attorneys-in-fact in these cases had the authority to enter into a pre-dispute agreement to arbitrate any claims arising between the respective principals and the nursing home facilities providing their care.

II. FACTUAL AND PROCEDURAL BACKGROUND—POWERS GRANTED TO THE RESPECTIVE ATTORNEYS-IN-FACT

The facts as relevant to the issues we review in each case are remarkably similar. Of course, the law relating to arbitration agreements and powers-of-attorney instruments applies equally to each case. However, because each of the power-of-attorney instruments involved in the three cases expresses the authority delegated by the principal to the attorney-

---

[8] KRS 411.140 provides: "No right of action for personal injury or for injury to real or personal property shall cease or die with the person injuring or injured, except actions for slander, libel, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury. For any other injury an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract."

[9] *See also Overstreet v. Kindred Nursing Centers Limited Partnership*, 2013-SC-000620-DG, 2015 WL 4967188 at *7 (Ky. Aug. 20, 2015) (holding that claims asserted under KRS 216.515 for violations of a nursing home resident's rights, except for personal injury or property damage claims falling within the protective scope of KRS 411.140, may be brought only by "the resident or his guardian" during the resident's lifetime. KRS 216.515(26)).

in-fact in different terms, each instrument requires a separate analysis. We proceed with a review of the essential facts of each case.

A. Extendicare Homes, Inc. d/b/a Shady Lawn Nursing Home v. Whisman, Case No. 2013-SC-426-I.

On February 21, 2011, Van Buren Adams executed a power-of-attorney document (the Adams-Whisman POA) designating his daughter, Belinda Whisman, as his attorney-in-fact. About a month later, Adams was admitted as a resident at Extendicare's Shady Lawn Nursing Home. As Adams' attorney-in-fact, Whisman executed the documents required by Extendicare for Adams' admission to the nursing home. She also signed a four-page document presented by Extendicare's admission staff, styled "Alternative Dispute Resolution Agreement." We refer to that document as "Extendicare's arbitration agreement." At the top of the first page, in all-capital letters and in underlined font, the document states that "SIGNING THIS AGREEMENT IS NOT A CONDITION OF ADMISSION TO OR CONTINUED RESIDENCE IN THE CENTER." On the second page, the document declares in capital letters that:

> THE PARTIES UNDERSTAND, ACKNOWLEDGE AND AGREE THAT BY ENTERING INTO THIS AGREEMENT, THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR DISPUTES DECIDED BY A COURT OF LAW OR TO APPEAL ANY DECISION OR AWARD OF DAMAGES RESULTING FROM THE ALTERNATIVE DISPUTE RESOLUTION PRO-

> CESS, EXCEPT AS PROVIDED HEREIN.

Extendicare's arbitration agreement also provided a comprehensive list of "covered disputes" which included the same statutory and common law claims later asserted in this action.

Adams died less than three months after his admission to Shady Lawn. The co-administrators of his estate, Belinda Whisman and Tony Adams, brought suit in the Trigg Circuit Court, naming as defendants the various entities that owned and operated Shady Lawn Nursing Home. The complaint alleged personal injuries to Adams caused by negligence, violations of KRS 216.510 *et seq.*, and wrongful death. Based upon the arbitration agreement, Extendicare moved the court to dismiss the lawsuit and to order the plaintiffs to submit their claims to arbitration. The plaintiffs argued that the power-of-attorney document did not vest Whisman with the authority to commit Adams' claims to arbitration. As relevant in this case, and as relied upon by Extendicare, the instrument provided as follows:

> I, VAN BUREN ADAMS...appoint my daughter, BELINDA WHISMAN, , . . my true and lawful attorney-in-fact, with full power for me and in my name and stead,...**to draw, make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns;...**[and] **to institute or defend suits concerning my property or rights,...**[.]

(emphasis added).

Extendicare argued below, as it does here, that the authority "to institute or defend suits concerning my property or rights" implicitly carried with it the authority to enter into the pre-dispute arbitration agreement. The Trigg Circuit Court denied Extendicare's motions and concluded that the Adams-Whisman POA "would not give Ms. Whisman the understanding that her authority would apply to...a waiver of the important right of bringing a lawsuit before a jury rather than before an arbitration panel."

The trial court reasoned that, despite the differences between the Adams-Whisman POA and the POA involved in *Ping*, nevertheless, the general principles governing *Ping* also applied here. The circuit court expressly noted our cautionary statement in *Ping* that "[a]bsent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." *Id.* at 593.

From this adverse ruling of the trial court, Extendicare sought immediate interlocutory relief in the Court of Appeals pursuant to CR 65.07. The Court of Appeals denied the motion, expressed its agreement with the trial court's application of *Ping*, and further grounded its opinion on *Ping's* comprehensive references to the law of agency, especially *Restatement (Third) of Agency* § 2.02 comment h. (2006):

> [S]ome acts that are otherwise legal create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal. A reasonable agent should

> consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment. In such circumstances, it would be reasonable for the agent to consider whether a person in the principal's situation, having the principal's interests and objectives, would be likely to anticipate that the agent would commit such a collateral act, given the nature of the principal's specific direction to the agent.

The Court of Appeals concluded, quoting both *Ping* and *Restatement (Third) of Agency*, that "an arbitration agreement would 'create legal consequences for a principal that are significant and separate from the transactions specifically directed by the principal,'" further noting that the explicit authority "'to institute or defend suits concerning my property or rights' did not imply the authority to initiate a claim in arbitration, or, correspondingly to waive Adams' right to seek redress in a court of law."

B. Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation v. Clark, Case No. 2013-SC-430-I.

On August 31, 2006, Olive G. Clark executed a power-of-attorney document (the Clark POA) designating her daughter, Janis Clark, as her attorney-in-fact. Nearly two years later, on August 16, 2008, Olive Clark became a resident of Kindred's Winchester

Centre for Health and Rehabilitation a/k/a Fountain Circle Health and Rehabilitation ("Winchester Centre"). Janis, as Olive's attorney-in-fact, executed for Olive the paperwork Kindred required for Olive's admission to Winchester Centre. At the same time, Janis, acting as Olive's attorney-in-fact, also signed a four-page document styled "Alternative Dispute Resolution Agreement Between Resident and Facility (Optional)." We refer to this document as "the Kindred arbitration agreement."

The Kindred arbitration agreement stipulates that "[a]ny and all claims or controversies arising out of or in any way relating to this ADR Agreement...or the Resident's stay at the Facility...shall be submitted to alternate dispute resolution as described in this Agreement." The document also defines "alternate dispute resolution" to include "binding arbitration." In the same nondescript font as the rest of the provisions, the document warns that "[b]inding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s)." In its final paragraph, the agreement provides that "execution of this Agreement is not a precondition to the furnishing of services to the Resident by the Facility."

Olive died about eight months later. Janis Clark, as executrix of Olive's estate and on behalf of the wrongful death beneficiaries, filed suit in the Clark Circuit Court against Kindred. The complaint asserted causes of action for personal injury, violations of KRS 216.510 *et seq.*, and wrongful death. Kindred moved to dismiss the action or, alternatively, to stay the action pending arbitration pursuant to the Kindred arbitration agreement.

In January 2012, the Clark Circuit Court granted Kindred's motion and entered a final order dismissing the pending lawsuit and compelling arbitration of the claims. However, following the August 23, 2012 rendition of *Ping*, and upon consideration of Janis's CR 60.02 motion, the circuit court vacated the order of dismissal. Based expressly upon the principles set forth in *Ping*, in November 2012, the trial court ruled that the Clark POA did not provide Janis Clark with the authority "to waive Olive Clark's jury trial rights."

> As relevant here, Olive's POA endowed Janis with:
>
> [the] **full power for me and in my name, place, and stead, in her sole discretion, to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way.**
> Without limiting or derogating from this general power, I specifically authorize my attorney in fact for me and in my name, place, and stead, in her sole discretion:
> To prepare and complete administrative documents necessary to secure or preserve any and all governmental benefits available to me;
> To lease, sell, or convey any real or personal property that I may now or ever own;
> To mortgage my property as she sees fit;

> To receive and receipt for any money which may now or hereafter be due to me;
> To retain and release all liens on real or person property;
> To draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds or agreements;
> To invest or reinvest my money for me;
> **To institute or defend suits concerning my property or rights;**
> To file all tax returns (including, without limitation, state and federal income tax returns);
> To enter all safe deposit boxes;
> To transfer assets of mine to any trust created by me for addition to trust principal; and
> **Generally to do and perform for me and in my name all that I might do if present.**
> Also, without limiting or derogating from this general power, I authorize my attorney in fact to make all decisions regarding my health care and medical treatment.

(emphasis added).

Kindred sought relief in the Court of Appeals pursuant to CR 65.07. The Court of Appeals denied Kindred's application for relief, relying upon the same rationale set out in its Extendicare opinion: namely, its interpretation of agency law as provided by the *Restatement (Third) of Agency* and our decision in *Ping*. Like Extendicare, Kindred now seeks

further review in this Court pursuant to CR 65.09. Kindred also asserts the additional claim that the attempt of the Clark Circuit Court to resurrect the dismissed case under CR 60.02 was ineffective because the circuit court had lost jurisdiction of the case following the entry of its January 2012 order dismissing the case.

C. Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation v. Wellner, Case No. 2013-SC-431-I.

On May 15, 2008, Joe Paul Wellner executed a power-of-attorney naming his wife, Beverly M. Wellner, as his attorney-in-fact. Three months later, he was admitted to Kindred's Winchester Centre. Beverly signed the Kindred admission documents as Joe's attorney-in-fact. She also signed Kindred's optional arbitration agreement. Joe resided at Winchester Centre for the next thirteen months, until a few days before his death on June 19, 2009. Beverly, individually, and as administratrix on behalf of her husband's estate and the wrongful death beneficiaries, brought suit in the Clark Circuit Court asserting the above-referenced claims.

The *Wellner* case shares many common elements with the *Clark* litigation. The complaints in both cases arise out of the same nursing home facility and assert the same causes of action—personal injury, wrongful death, and violations of KRS 216.510, *et seq.* The two cases were filed contemporaneously in the Clark Circuit Court; the parties on both sides of the two cases are represented by the same lawyers, and both cases were heard by the same circuit court judge, Hon. Jeanne C. Logue.

Like the *Clark* case, Judge Logue initially dismissed the *Wellman* case in favor of arbitration. After *Ping*, the judge reconsidered the case pursuant to CR 60.02 and reversed the prior ruling. Upon review, the Court of Appeals affirmed. Of course, the most determinative feature of this case, as well as the others, is the language of the power-of-attorney document. Not surprisingly, the power-of-attorney instrument in this case differs from those found in the other cases under review. In pertinent part, it provides Beverly M. Wellner with authority to exercise the following powers on behalf of Joe:

> 1. To receive, take receipt for, and hold in possession, manage and control all property, both real and personal, which I now or may hereafter own, hold, possess or be or become entitled to with full power to sell, mortgage or pledge, assign, transfer, invest and reinvest the same or any part thereof in forms of investment, including bonds, notes and other obligations of the United States deemed prudent by my said wife in her discretion, with full power to retain the same without liability for loss or depreciation thereof.
>
> **2. To demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor).**
>
> 3. To make, execute, deliver and endorse notes, drafts, checks and order for the payment of money or other property from or to me or order in my name.

4. To make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance.

5. To have access to my safe deposit boxes, act as my proxy with power of substitution to vote all stocks or securities in my name in relation to any individual or corporate action, to deposit any stocks or securities in connection with any plans of prospective or reorganization committees, to accept and exercise all rights, to subscribe for securities and to sell same

6. To receive and receipt for all rents and income to which I am or may become entitled, pay therefrom all necessary expenses for the maintenance, upkeep, care and protection of my property, deduct therefrom her own reasonable compensation, and pay the net income from time to time to me or in such manner as I shall direct, or in the absence of such payment to me or at my discretion, to invest the same for me in her judgment in the manner above described.

7. To prepare, execute and file federal or state income tax returns and other real and personal property tax lists and to pay all such taxes.

8. In the event of my illness, incapacity or other emergency to have full power to make all health care decisions for me and in my stead; this power shall encompass the power to make any decision which I might myself

> make in authorizing or refusing treatment, surgery or other health care. My Attorney-in Fact shall have the right to refuse the administration of nutrition and hydration.
>
> 9. If I should every need a guardian or curator or similar person or entity to assist me if I am unable to fully handle all of my affairs, and if this Power of Attorney should not be sufficient therefor, I nominate my wife, BEVERLY M. WELLNER, as my guardian, curator, etc., and I specifically provide that surety not be required on her bond as such.
>
> 10. I hereby further grant unto my Attorney-in-Fact full power in and concerning the above premises and to do any and all acts as set forth above as fully as I could do if I were personally present, and at my decease to pay, transfer and deliver over to my personal representative, all principal and income then in his possession and control, and I do ratify and confirm whatever my said Attorney-in-Fact shall lawfully do under these presents, provided however, that my attorney shall not bind me as surety, guarantor for accommodation nor give away any of my estate, whatsoever, nor shall my attorney be authorized to accept service of process for or on my behalf....

(emphasis added).

Like the other two cases, the *Wellner* case comes to this Court pursuant to CR 65.09. As in the *Clark* case, Kindred also challenges in *Wellner* the jurisdiction of the circuit court to set aside, pursuant to CR

60.02, the original order of dismissal entered several months earlier.

III. ANALYSIS

As in *Ping*, our disposition of these cases requires no consideration of the specifics of the respective arbitration agreements. There is no dispute that *if* the arbitration agreements were validly formed, they are enforceable as written under both the Kentucky Uniform Arbitration Act (KUAA), KRS 417.050 *et seq.*, and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, at least with respect to the decedents' claims for personal injury and statutory violations. Consequently, the disputes before us are not about the *enforcement* of validly formed arbitration agreements covered by the KUAC and the FAA. Rather, the disputes are about the *formation* of the arbitration agreements; and specifically, whether the agent purporting to sign the arbitration agreement on behalf of his principal had the authority to do so.

All three of the arbitration agreements involved here provide that the Kentucky Arbitration Act shall govern, with secondary reliance upon the Federal Arbitration Act if the Kentucky law is found to be inapplicable. Choice of law provisions are generally valid in arbitration clauses. *Hathaway v. Eckerle*, 336 S.W.3d 83, 87 (Ky. 2011). However, as applicable to this case, there is no material difference between the FAA and the KUAC.

Like its federal counterpart, Kentucky law favors the enforcement of arbitration agreements. *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 457 (Ky. 2009) ("We do not by this opinion signify any retreat from our recognition of the prevalent public policy favoring enforcement of agreements to arbitrate."). Doubts

about the scope of issues subject to arbitration should be resolved in favor of arbitration. *See Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 855 (Ky. 2004) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)).

Nevertheless, before the *enforcement* of an arbitration agreement can be addressed, it must be established that an arbitration agreement was *formed*. *Mt. Holly Nursing Center v. Crowdus*, 281 S.W.3d 809, 813 (Ky. App. 2008). Unless an arbitration agreement was validly formed, there is no arbitration agreement to be enforced. Questions concerning the formation of an arbitration agreement are resolved in accordance with the applicable state law governing contract formation. *See JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902, 907 (Ky. 2014) ("[E]ven the federal authorities agree that *whether* there is a valid arbitration agreement is a matter of state contract law, so long as the state law in question does not single out arbitration agreements."). We clarified in *Ping:*

> a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate...[T]hat initial showing is addressed to the court, not the arbitrator[]...and the existence of the agreement depends on state law rules of contract formation.... An appellate court reviews the trial court's application of those rules *de novo*, although the trial court's factual findings, if any, will be disturbed only if clearly erroneous. [citing *North Fork Collieries v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010)].

376 S.W.3d at 590 (citations omitted).

The fundamental principle of contract formation is that "[t]o create a valid, enforceable contract, there must be a voluntary, complete assent by the parties having capacity to contract." *Conners v. Eble*, 269 S.W.2d 716, 717-18 (Ky. 1954). This principle applies with no less vigor when the issue is formation of an arbitration contract. "Assent to be bound by the terms of an [arbitration] agreement must be expressed." *Ally* Cat, 274 S.W.3d at 456. A person's assent to a contractual agreement can be provided by an agent acting as an attorney-in-fact, *if* the authority to do so was duly conferred upon the attorney-in-fact by the power-of-attorney instrument. Conversely, if that authority was not so conferred by the principal, the requisite assent, of course, cannot be provided by the attorney-in-fact.

Whether the principal's assent to the arbitration agreement was obtained is, in each of the cases under review, a question of law that depends entirely upon the scope of authority set forth in the written power-of-attorney instrument. *Ping*, at 590. *Ping* further clarifies:

> The scope of [the agent's] authority is thus left to the principal to declare, and generally that declaration must be express...[E]ven a "comprehensive" durable power would not be understood as implicitly authorizing all the decisions a guardian might make on behalf of a ward. Rather, we have indicated that an agent's authority under a power of attorney is to be construed with reference to the types of transaction expressly au-

> thorized in the document and subject always to the agent's duty to act with the "utmost good faith."

Id. at 592. (citations omitted).

Focusing even closer on the question of whether, by way of a durable power-of-attorney, a principal vested his agent (his attorney-in-fact) with the authority to select arbitration and its concomitant waiver of the constitutional right of access to the courts, *Ping* cites to *Restatement (Third) of Agency* § 2.02 comment h. (2006).[10] We said that "a collateral

---

[10] Restatement (Third) Of Agency § 2.02 (2006)

h. Consequences of act for principal. Even if a principal's instructions or grant of authority to an agent leave room for the agent to exercise discretion, the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts.

Three types of acts should lead a reasonable agent to believe that the principal does not intend to authorize the agent to do the act. First are crimes and torts. If a principal authorizes the agent's commission of a crime or an intentional tort, the principal will be subject to liability for the agent's wrongdoing. *See* § 7.04. The agent, additionally, will be subject to individual liability. *See* § 7.01. An agent is under no duty to obey a direction from the principal to commit such an act. *See* § 8.09(2). The bounds of the law are applicable to all, including principals, whether or not individuals. *See* Principles of Corporate Governance: Analysis and Recommendations § 2.01 and Comment *g*.

Second, acts that create no prospect of economic advantage for a principal, such as gifts and uncompensated uses of the principal's property, require specific authorization. This is so even if an agent has notice that the principal acts philanthropically as to matters unconnected to the agency. Moreover, if it is normally not reasonable to believe that the principal will benefit from an act, a reasonable agent should not infer that the principal wishes the agent to do the act and therefore should not commit the act unless the principal communicates specifically that the

agreement to waive the principal's right to seek redress of grievances in a court of law"[11] was an act "with significant legal consequences." We emphasized: "Absent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." *Id.* at 593.

Ping faithfully applied the age-old principle that a power-of-attorney must be strictly construed in conformity with the principal's purpose. *Harding v.*

---

principal wishes the act to be done. Thus, an agent should not infer that the principal wishes gifts to be made from the principal's property from the fact that the principal has authorized the agent to manage the principal's property and has given the agent discretion in making management decisions. For treatment of the authority of an agent to make gifts under a durable power of attorney, *see* Restatement Third, Property (Wills and Other Donative Transfers) § 8.1, Comment *l*.

Third, some acts that are otherwise legal create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal. A reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment. In such circumstances, it would be reasonable for the agent to consider whether a person in the principal's situation, having the principal's interests and objectives, would be likely to anticipate that the agent would commit such a collateral act, given the nature of the principal's specific direction to the agent.

[11] By "collateral" agreement we referred to the separate, optional arbitration agreement signed in conjunction with, but not incorporated into, the other contractual arrangements for residential care. The arbitration agreements involved in this case are "collateral" agreements.

Kentucky River Hardwood Co., quoting U.S. Fidelity Co. v. McGinnis, 145 S.W. 1112 (Ky. 1912), states:

> It is the law that a formal instrument conferring authority will be strictly construed, and can be held to include only those powers which are plainly given, and those which are necessary, essential and proper to carry out those expressly given. It will be presumed that the principal, in conferring a power intended to confer with it the right to do those things without the object contemplated could not be accomplished, but beyond this the authority will not be extended by construction.

265 S.W. 429, 431 (Ky. 1924) (citations omitted).

We apply these same venerable principles to the cases at hand. We look now at the specific language of the respective POA documents that, as claimed by Extendicare and Kindred, authorized the agents to enter into arbitration agreements.

1. The Adams-Whisman POA

Extendicare identifies only two expressions of authority mentioned in the Adams/Whisman POA to support its claim that Adams had authorized Whisman to enter into a pre-dispute arbitration agreement. First, Extendicare points to the power to "institute or defend suits concerning [Adams'] property or rights." Second, Extendicare relies upon Whisman's power "to draw, make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns."

a. The power to "institute or defend suits concerning my property rights" did not confer the authority to enter in a pre-dispute arbitration agreement.

Extendicare posits that the grant of specific authority to "institute or defend suits concerning my property rights" is an express authorization by Adams giving Whisman the power to choose arbitration as the mode for resolving disputes over his property rights. We disagree for several reasons.

First, at the most elementary level, even if we agreed that the conduct of initiating an arbitration proceeding for personal injury claims was functionally equivalent to instituting a suit concerning Adams's property rights, the act that required authorization was not *the act of initiating an arbitration proceeding*. Obviously, Whisman never initiated an arbitration proceeding. The action under review is *the signing of the pre-dispute arbitration agreement* when no personal injury or property rights were in dispute. That conduct does not remotely resemble the institution of a property rights claim.

We agree that the power to "institute or defend suits concerning my property rights" would necessarily encompass the power to make litigation-related decisions within the context of a suit so instituted, including the decision to submit the pending dispute to mediation or arbitration. But that, too, is not what Whisman did. Whisman's action, at the time it was taken, had absolutely nothing to do with the institution or defense of claims concerning Adams property rights. Instituting *"suits concerning my property rights"* is not practically or conceptually similar in any way to making an agreement that future claims will be taken to arbitration.

Secondly, the current edition of Black's Law Dictionary defines "suit" as "[a]ny proceeding by a party or parties against another in a *court of* law." SUIT, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). By way of comparison, an earlier edition of Black's Law Dictionary defines "suit" as "any proceeding by one person or persons against another or others *in a court of justice in which a plaintiff pursues, in such court*, the remedy the law affords him for the redress of an injury or the enforcement of a right[.]"BLACK'S LAW DICTIONARY, 1603 (4th ed. 1968) (emphasis added). There is no doubt that in the language of the law, a "suit" occurs in a court of law; arbitration by its very purpose and design is intended to *avoid* suits in a court of law; it is the antithesis of a suit in a court of law.

The New Oxford American Dictionary defines "suit" in the context that concerns us, as "short for lawsuit."[12] In turn, "lawsuit" is defined as "a claim or dispute brought to a court for adjudication."[13] *See Shepherd v. Standard Motor Co.*, 92 S.W.2d 337, 337 (Ky. 1936) ("This term ['lawsuit'] is defined and generally recognized as a suit at law or in equity; an action or a proceeding in a civil court; a process in law instituted by one party to compel another to do him justice.") (citations omitted).

Thus, in both common and legal parlance, "instituting suits concerning my property rights" manifests a specific intention to pursue one's rights in the courts of law, not by private arbitration. Instituting a

---

[12] NEW OXFORD AMERICAN DICTIONARY 1740 (Oxford University Press, 3d ed. 2010).

[13] NEW OXFORD AMERICAN DICTIONARY 989 (Oxford University Press, 3d ed. 2010).

suit is not the same thing as initiating a claim in arbitration; the two are mutually exclusive actions. Far from being consistent with the explicitly-stated authority to institute a lawsuit, Extendicare's arbitration agreement *expressly prohibits* Whisman from doing the very thing that Adams's POA unequivocally authorized her to do.

Extendicare's position is that the "institute or defend suits" language of the Adams/Whisman POA is a general authorization for engaging in litigation, which implicitly provides the authority to do whatever is incidental to the suit or reasonably necessary to achieve the purpose of the litigation. *See Restatement (Second) of Agency* § 35 (1958) ("Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it."). However, we cannot rationally say that signing an arbitration agreement was "incidental to" a claim concerning Adams' property rights when the specific right, to which the claim is allegedly "incidental," did not exist. An act cannot be "incidental" to something that does not exist or has not happened. An arbitration agreement signed *before* a cause of action exists cannot be "reasonably necessary" to the resolution of that cause. Whisman's execution of the arbitration agreement was not "incidental" to or "reasonably necessary" in the furtherance of any claim at all concerning Adams' property rights.

We agree that the "institute or defends suits" provision in the POA would authorize the attorney-in-fact to do what is reasonably necessary in the management of an actual claim or lawsuit, including the authority to settle or compromise the claim. Like

countless other decisions required in the management of a lawsuit, settling a claim is within the ambit of the power expressly granted here. Nothing in our analysis would prevent Whisman or any similarly-situated attorney-in-fact from exercising her judgment in that regard. However, an agreement to submit a dispute to arbitration is the diametrical *opposite* of "settling" a claim. Settling a claim ends the controversy, whereas arbitrating a claim means fighting it out before an arbitrator rather than a judge and jury.

Whisman's act of signing Extendicare's arbitration agreement was not "incidental" to or "reasonably necessary" to the institution or defense of a "suit" concerning Adams' property rights. Instead, it expressly forfeited Adams' constitutional rights to have disputes decided in a court of law and to appeal any decision or award of damages arising therefrom, a point that we address in further detail in Part IV of this opinion.

b. The power "to draw, make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns" does not confer the authority to enter in a pre-dispute arbitration agreement.

Extendicare also argues that Whisman had the authority to sign a pre-dispute arbitration agreement as an exercise of the express power set forth in the Adams-Whisman POA to "to draw, make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns." *Ping* squarely refutes that argument.

We held in *Ping* that powers granted expressly in relation to the management of the principal's property and financial affairs, and to health-care decisions, "did not give [the attorney-in-fact] a sort of universal authority beyond those express provisions." *Id.* at 592. Citing to *Rice v. Floyd*, 768 S.W.2d 57, 58 (Ky. 1989), we said "an agent's authority under a power of attorney is to be construed with reference to the types of transaction expressly authorized in the document[.]" *Id.; see also Restatement (Second) of Agency* § 37(1) (1958) ("Unless otherwise agreed, general expressions used in authorizing an agent are limited in application to acts done in connection with the act or business to which the authority primarily relates."). It is self-evident that the power relied upon here by Extendicare relates to the conduct of Adams' financial and banking affairs, and not to the vindication of unanticipated causes of action that might arise in the future.

In summary, we agree with the Trigg Circuit Court and the Court of Appeals that Whisman was not authorized by her father to enter into Extendicare's arbitration agreement. Adams cannot therefore be deemed to have given his assent to the agreement, and in the absence of that assent there was not a valid agreement to be enforced.

2. *The Wenner POA*

In support of its argument that Beverly Wellner was authorized to execute on Joe's behalf the Kindred arbitration agreement, Kindred relies upon two provisions of the Wellner POA: 1) the power "to demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings there-

for)"; and, 2) the power "to make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance."

a. ***The power "to demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor)" does not confer the authority to enter in a pre-dispute arbitration agreement.***

Kindred acknowledges that this provision of the Wellner POA granting the power to "demand, sue for, collect, recover and receive all...demands whatsoever" and "to institute legal proceedings" did not expressly authorize Beverly to sign the pre-dispute arbitration agreement. Instead, Kindred argues that such authorization must be implied because arbitration is "reasonably necessary or incidental," as Kindred puts it, to "the ability to settle suits that have been brought pursuant to Joe's intended grant of authority." Kindred argues, "it would be an absurd result to recognize an agent's power to bring suit...and then deny that she has the power to settle those very claims." We do not disagree; but "arbitrating" is not "settling."

An agent charged with the responsibility of managing a claim in litigation would ordinarily need the ability to settle the claim. But, as we said above in reference to the *Whisman* case, initiating an arbitration proceeding—or more precisely, entering into a pre-dispute arbitration agreement, is a far cry from "settling" a claim. Initiating arbitration is the com-

mencement of a legal battle; settling a claim is the resolution of a legal battle. A pre-dispute arbitration agreement "settles" nothing in relation to present and future claims of the principal.

b. The power "to make...contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance does not confer the authority to enter into a pre-dispute arbitration agreement applicable to future personal injury claims."

Kindred next contends that Beverly was authorized to provide Joe's assent to the arbitration agreement because it gave her the power "to makecontracts of *every nature in relation to both real and...personal property*, including stocks, bonds, and insurance." (emphasis added). We certainly agree that a personal injury claim is a chose-in-action, and therefore constitutes personal property. Kentucky has long acknowledged that "choses in action are personal property." *Button v. Drake*, 195 S.W.2d 66, 69 (Ky. 1946).

In *Button*, our predecessor court examined several definitions of "property" from a variety of sources, this being, perhaps, the broadest one, taken from *Commonwealth v. Kentucky Distilleries & Warehouse Co.*, 136 S.W. 1032, 1037 (Ky. 1911):

> The term (property) is therefore said to include everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, choses in action as well as in possession, *everything which*

> *has an exchangeable value, or which goes to make up one's wealth or estate.*

(emphasis added).

The Court in *Button* also cites to this definition from *Trimble v. City of Mt. Sterling*, 12 S.W. 1066, 1067 (Ky. 1890): "The words 'personal property' mean money, goods, chattels, things in action, and evidences of debt." *Button*, at 69.

Joe's personal injury claim was personal property and Beverly had the authority to make contracts relating to it. But the Kindred pre-dispute arbitration agreement was not a contract made "in relation" to a property claim. The agreement did *nothing* to affect any of Joe's property or his property rights. The arbitration agreement does not even purport to be a "contract...in relation to both real and personal property." As clearly expressed within the agreement itself,[14] the agreement was made in relation to Joe's constitutional right to access the courts and to trial by jury. Constitutional rights are decisively *not* "personal property" as we have defined the term. They are not "money, goods, chattels, things in action, and evidences of debt;" nor do they have "an exchangeable value, or which goes to make up one's wealth or estate."

Beverly's authority to deal with Joe's real and personal property does not translate into the power to relinquish his constitutional rights. Consequently, we conclude that Beverly was not authorized to pro-

---

[14] The Kindred arbitration agreement states: "Binding arbitration means the parties are waiving their right to trial, including their right to a jury trial, their right to a trial by a Judge, and their right to appeal the decision of the arbitrator(s)."

vide Joe's assent to an agreement waiving his constitutional rights by committing his future personal injury claims to arbitration.

3. The Clark POA

Kindred argues that Janis Clark was expressly authorized to enter into its pre-dispute arbitration agreement on behalf of her mother, Olive, by virtue of the language of the POA providing Janis with the power "[t]o draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds or agreements;...and Generally to do and perform for me and in my name all that I might do if present;" and "[t]o *institute or defend suits concerning my property or rights.*"

a. The power "to institute or defend suits concerning my property rights" does not confer the authority to enter in a pre-dispute arbitration agreement.

For the reasons cited in the foregoing analysis of the "institute or defend suits" provisions of the Adams-Whisman POA and the "institute legal proceedings" of the Wellner POA, we conclude that this provision, granting the power "to institute or defend suits concerning my property rights," cannot be construed as supporting the authority for the attorney-in-fact to sign a pre-dispute arbitration agreement binding the principal and his estate to arbitrate future personal injury claims.

b. The powers to "to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way[.]" and [g]enerally to do and perform for me in my name all that I might if present" are broad enough and clear enough, unless otherwise

prohibited, to encompasses the signing of a pre-dispute arbitration agreement.

In *Ping*, we reiterated the general rule that an express authorization in a power-of-attorney document for an attorney-in-fact to engage in specified activities implies that acts "reasonably necessary" to the specified activity are also authorized. 376 S.W.3d at 594. We cautioned, however, with reference to *Restatement (Third) of Agency* § 2.02 comment h. (2006), that given the "significant legal consequences" arising from an agreement waiving the principal's rights of access to the courts and to trial by jury, "authority to make such a waiver is not to be inferred lightly." *Id.* at 593. Our holdings throughout this opinion, as in *Ping* itself, serve to highlight our reservation about casually inferring a power laden with such consequences.

However, a literal comprehension of the extraordinarily broad grant of authority expressed by these provisions—"to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way" and "to do and perform for me in my name all that I might if present"—requires no inference about what the scope of authority encompassed within the expressed power. One might entertain considerable doubt about whether Olive consciously intended to forfeit her right of access to the courts and to a jury trial, but the language of her POA encompasses that result regardless of Olive's actual intent. Given this extremely broad, universal delegation of authority, it would be impossible to say that entering into a pre-dispute arbitration agreement was not covered.

D. Summary

In summation, we conclude that Clark POA's universal grant of authority, while not expressly providing the authority to bind the principal to an arbitration agreement, it implicitly does so. The more limited grants of authority provided in the Adams-Whisman POA and the Wellner POA do not provide the attorneys-in-fact with that authority. Based upon these conclusions, we affirm at this point the order of the Court of Appeals in *Extendicare Homes, Inc., et al, v. Whisman* (Case No. 2013-SC-426-I).

However, our analysis continues because, in *Kindred Nursing Centers Limited Partnership, et al., v. Wellner* (Case No. 2013-SC-431-I) and *Kindred Extendicare Homes, Inc., et al. v. Clark* (Case No. 2013-SC-426-I), we must further consider the additional issue of whether the trial court had jurisdiction to enter an order pursuant to CR 60.02 vacating the earlier dismissal. With respect to *Kindred Extendicare Homes, Inc., et al. v. Clark*, as well as the other cases, we also consider the extent to which the authority of an agent to waive his principal's fundamental constitutional rights to access the courts, to trial by jury, and to appeal to a higher court, can be inferred from a less-than-explicit grant of authority.

IV. AN AGENT'S AUTHORITY TO WAIVE HIS PRINCIPAL'S CONSTITUTIONAL RIGHT TO ACCESS THE COURTS AND TO TRIAL BY JURY WILL NOT BE INFERRED BUT MUST BE CLEARLY EXPRESSED BY THE PRINCIPAL

In the cases before us we address the question of whether a person will be deemed to have waived fundamental constitutional rights when, in his stead, his attorney-in-fact signed a pre-dispute arbitration agreement. Our focus has been, and remains, upon

the scope of the powers expressed in the power-of-attorney document, and whether those expressed powers are sufficient to supply the principal's assent needed to form an agreement, which on its face, forfeits those fundamental constitutional rights.

Upon review of these cases, we are convinced that the power to waive generally such fundamental constitutional rights must be unambiguously expressed in the text of the power-of-attorney document in order for that authority to be vested in the attorney-in-fact. The need for specificity is all the more important when the affected fundamental rights include the right of access to the courts (Ky. Const. § 14),[15] the right of appeal to a higher court (Ky. Const. § 115),[16] and the right of trial by jury, which incidentally is the *only* thing that our Constitution commands us to "hold sacred." *See* Ky. Const. § 7 ("The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.").

There are limits to what we will infer from even the broadest grants of authority that might be stated in a power-of-attorney instrument. Lest there be any doubt concerning the propriety of drawing a line that limits the tolerable range of inferences we would allow from such a universally broad grant as that contained in the Clark POA, it is worth considering how

---

[15] "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

[16] "In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court."

we would react when other fundamental rights are at stake.

It would be strange, indeed, if we were to infer, for example, that an attorney-in-fact with the authority "to do and perform for me in my name all that I might if present to make any contracts or agreements that I might make if present" could enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude. It would, of course, be absurd to infer such audacious powers from a non-specific, general, even universal, grant of authority. So too, it would be absurd to infer from a non-specific, universal grant, the principal's assent to surrender of other fundamental, *even sacred*, liberties.

In this vein, we would not seriously entertain the claim that an agent had the implied power to enter a plea agreement pleading his principal guilty to a criminal offense. We are not aware of any other circumstances in which a generic grant of authority to make contracts or to do "whatever I might do if present," would be deemed to imply a conscious decision to forego fundamental constitutional rights. Absent a clearly expressed, knowing, and voluntary waiver, we do not conclude that an individual has waived his constitutional right to remain silent in the face of police questioning; to have the assistance of counsel during a trial; to plead guilty to a crime and thereby waive his right to a trial. *See Brady v. United States*, 397 U.S. 742, 748, (1970) ("Waivers of constitutional rights not only must be voluntary but must be know-

ing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

Without any doubt, one may expressly grant to his attorney-in-fact the authority to bargain away his rights to access the courts and to trial by jury by entering into a pre-dispute arbitration agreement. No one challenges that; we accept such authorized waivers often in the context of criminal cases. We will not, however, infer from the principal's silence or from a vague and general delegation of authority to "do whatever I might do," that an attorney-in-fact is authorized to bargain away his principal's rights of access to the courts and to a jury trial in future matters as yet not anticipated or even contemplated. A durable power-of-attorney document often exists long before a relationship with a nursing home is anticipated. It bears emphasis that the drafters of our Constitution deemed the right to a jury trial to be *inviolate*, a right that cannot be taken away; and, indeed, a right that is *sacred*, thus denoting that right and that right alone as a divine God-given right.

It is argued that the power-of-attorney documents we see in this case would endow the attorneys-in-fact with the authority to waive any and all constitutional rights of his principal as he may deem proper, at least insofar as the waiver can be effectuated by a "contract" or an "agreement." However, as illustrated by our decision in *Ping*, it is fundamental that we will not read provisions into a contract that were not put there by the principal.

We held in *Rice v. Floyd*, 768 S.W.2d 57, 59 (Ky. 1989), that even a "comprehensive" durable power-of-attorney would not be construed to implicitly authorize *any* and all decisions a guardian might make on

behalf of his ward. Infusing the authority to enter into "any contract or agreement" with the authority to waive fundamental constitutional rights eviscerates our long line of carefully crafted jurisprudence dictating that the principal's explicit grant of authority delineated in the power-of-attorney document is the controlling factor in assessing the scope of the powers of the attorney-in-fact.

It makes no difference that arbitration clauses are commonplace in nursing home contracts and that a principal might anticipate that someday his agent will act to admit him into one. This reality does not vitiate our conclusion that to cloak the agent with authority to waive the fundamental right to an adjudication by judge or jury, the power-of-attorney document must expressly so provide. The inclusion of such a provision, when it comports with the principal's intent and expectation, would be no burden.

The FAA provides that a "written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis added). As noted above, the question of whether an arbitration agreement was ever formed is a matter of state law, "so long as the state law in question does not single out arbitration agreements." *See Bluegrass Powerboats*, 424 S.W.3d at 907; and *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009) (State law is applicable to determine which contracts are binding and enforceable under the FAA "if that law arose to govern issues concerning the validity, revocability,

and enforceability of contracts generally...." *quoting Perry v. Thomas*, 482 U.S. 483, 493, n. 9 (1987)).

Pursuant to our holding in *Ping*, an arbitration "agreement" entered into by an attorney-in-fact which exceeds the grant of authority conferred by his principal is no agreement at all. This principle derives from the general principles of law and equity that an attorney-in-fact may not act beyond the powers he has been granted under the power-of-attorney instrument. It follows that there are specific and concise grounds as exist at law or in equity, applicable to the formation of contracts generally, for establishing the invalidity of the three arbitration agreements at issue because each of them was signed by an agent lacking his principal's authority to bargain away fundamental constitutional rights. Neither the KUAA nor the FAA is offended by that principle.

We are, of course, well aware that arbitration is not only sanctioned, but indeed promoted, by the Kentucky Constitution. Section 250 states: "It shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment." This Constitutional endorsement of arbitration does not vitiate the elementary rule that an attorney-in-fact may not waive his principal's fundamental constitutional rights absent an explicit power to do so. Nor does § 250 in any way reduce the power and force of § 7 deeming the right to a jury trial to be inviolate and sacred. The operative phrase of § 250 is that the parties "*may choose*" this mode of dispute resolution, signifying that waiving one's right to trial by judge or jury is his personal *choice*. In the circumstances we address, the princi-

pals did not *"choose"* this mode of adjustment; neither did they *choose* the corresponding waiver of their sacred right to a jury trial. More importantly, they did not authorize their respective attorneys-in-fact to "choose" it for them.

We reject the notion that this holding conflicts with the decisions of the United States Supreme Court in *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012), and *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, (2011). *Concepcion* struck down a California doctrine that explicitly declared unconscionable, and thus unenforceable, all arbitration clauses in consumer contracts containing class action waivers. The Supreme Court held that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 1747. To the contrary, our holding does not prohibit arbitration of any "particular type of claim." Consistent with *Concepcion* and the FAA's requirement for the existence of a valid arbitration agreement, we decline to compel arbitration *only* when the assent of a party, purportedly bound by the agreement, has not been validly obtained. Nursing home facilities may still enforce arbitration agreements with their residents when the resident has signed the agreement or validly authorized his agent to sign in his stead.

Marmet applied the rule of *Concepcion* to strike down West Virginia's explicit policy of refusing to enforce any "arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death," *Marmet*, 132 S.Ct. at 1203. Before *Marmet*, a pre-dispute arbitration clause between a

nursing home and a resident could not be enforced in West Virginia to compel arbitration of *any* claim based upon personal injury or wrongful death. Our rule does nothing that even approaches that kind of restraint on arbitration. We simply require, as we do with any contract, that the parties to be bound by the agreement validly assented. Nursing home residents may still enter into pre-dispute arbitration agreements and those agreements will be enforced, like any contract, if the agreement of the persons to be bound thereby has been obtained, either directly in person or by a duly authorized agent. We say only that an agent's authority to waive his principal's constitutional right to access the courts and to trial by jury must be clearly expressed by the principal.

A straight-forward application of our rule that an attorney-in-fact cannot act beyond the powers granted in the power-of-attorney document stands in stark contrast to the blanket prohibitions against arbitration agreements condemned in *Marmet* and *Concepcion*. Whatever hostility our rule evinces is not against the federal policy favoring arbitration; indeed, Kentucky shares that same policy, as we have proclaimed on several occasions.[17] Our rule merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relin-

---

[17] For example: *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 854 (Ky. 2004) ("Kentucky and national policy have generally favored agreements to arbitrate."); *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 457 (Ky. 2009) ("We do not, by this opinion, signify any retreat from our recognition of the prevalent public policy favoring enforcement of agreements to arbitrate."); *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561, 577 (Ky. 2012) ("[O]ur state Constitution and statutes favor the enforceability of arbitration agreements.").

quishment of fundamental constitutional rights regardless of the context in which they arise.

V. THE CLARK CIRCUIT COURT HAD JURISDICTION PURSUANT TO CR 60.02 TO GRANT RELIEF FROM ITS ORDER COMPELLING THE PARTIES TO SUBMIT THE CONTROVERSIES TO ARBITRATION

This issue affects only the two cases originating in the Clark Circuit Court: *Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation v. Wellner* (Case No. 2013-SC-431-I) and *Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation v. Clark* (Case No. 2013-SC-430-I); it does not involve *Extendicare Homes, Inc. d/b/a Shady Lawn Nursing Home v. Whisman* (Case No. 2013-SC-426-I).

Upon its initial consideration of the *Clark* and *Wellner* cases, in January 2012, the Clark Circuit Court granted Kindred's motions to dismiss the cases and compel the parties to submit the pending claims to arbitration. Although not expressly designated as final and appealable orders, the circuit court's orders were, by all indications, final.

CR 60.02 provides that upon specified grounds,[18] a trial court "may, upon terms as are just, relieve a

---

[18] The grounds stated by CR 60.02 are: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or

party...from its final judgment, order, or proceeding[.]" After the September 2012 rendition of our opinion in *Ping*, counsel for Clark and Wellner moved the Clark Circuit Court for relief pursuant to CR 60.02 from the January orders compelling arbitration, citing the greater elucidation of the subject provided by *Ping* as cause.

The trial court was sufficiently moved by the argument such that it exercised its authority to grant relief from the final judgment and reconsider the issue, resulting in its ultimate decision to overrule Kindred's motions to dismiss and compel arbitration. Kindred argues that the trial court lacked jurisdiction for its action. Clearly, CR 60.02 vests the trial court with the jurisdiction to act.

Motions under CR 60.02 are addressed to the sound discretion of the trial court. *See Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957), citing *Tozer v. Charles A. Krause Milling* Co., 189 F.2d 242 (3 Cir. 1951). We review trial court decisions under CR 60.02 for abuse of discretion. "Given the high standard for granting a CR 60.02 motion, a trial court's ruling on the motion receives great deference on appeal...." *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998) (citing *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996)). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We are unable to conclude that the trial judge abused her discretion in her consideration of the respective CR 60.02 motions.

---

it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

VI. CONCLUSION

Based upon the forgoing analysis, we affirm the orders of the Court of Appeals insofar as they deny the requests for interlocutory relief. It is hereby ORDERED as follows:

1) The CR 65.09 motion of Extendicare Homes, Inc., *et al.*, in Case No. 2013-SC-426-I for interlocutory relief compelling arbitration is DENIED, based upon our conclusions that the powers vested in Belinda Whisman did not encompass the power to enter into an arbitration agreement regarding the claims of the decedent, Van Buren Adams, and because the authority to waive Adams' constitutional rights of access to the courts by judge or jury and to appeal to a higher court was not explicitly set out in the power-of-attorney document, and because Whisman was not authorized to enter into an arbitration agreement on behalf of the wrongful death beneficiaries;

2) The CR 65.09 motion of Kindred Extendicare Homes, Inc., *et al.*, in Case No. 2013-SC-426-I is DENIED, based upon our conclusion that the authority to waive Olive Clark's constitutional rights of access to the courts by judge or jury and to appeal to a higher court was not explicitly set out in the power-of-attorney document, and because Janis Clark was not authorized to enter into an arbitration agreement on behalf of the wrongful death beneficiaries;

3) The CR 65.09 motion of Kindred Nursing Centers Limited Partnership, *et al.*, in Case No. 2013-SC-431-I for interlocutory relief compelling arbitration is DENIED, based upon our conclusions that the powers vested in Beverly Wellner did not encompass the power to enter into an arbitration agreement regarding the claims of the decedent, Joe Wellner, and

because the authority to waive Joe Wellner's constitutional rights of access to the courts by judge or jury and to appeal to a higher court was not explicitly set out in the power-of-attorney document, and because Beverly Wellner was not authorized to enter into an arbitration agreement on behalf of the wrongful death beneficiaries.

Barber, Cunningham, and Keller, JJ., concur. Abramson, J., dissents by separate opinion in which Minton, C.J. and Noble, J., join. Noble, J., dissents by separate opinion in which Minton, C.J., joins.

ABRAMSON, J., DISSENTING: Relying on a "God-given right" to a jury trial, the majority announces a new rule that contravenes the United States Constitution and controlling precedent from the Supreme Court of the United States. To posit that the right to a jury trial is the preeminent right in our Kentucky Constitution (apparently superior to the rights that precede it in that document including, for example, the rights to life, liberty, religious freedom, assembling for the common good, and acquiring property) and, accordingly, prohibit an agent acting under an unrestricted general "power to contract" from entering into an arbitration agreement is at best seriously misguided. For the reasons stated herein, I strongly dissent.[19]

Although arbitration has been constitutionally based in Kentucky since 1799 and both federal and

---

[19] However, I do concur in the majority's adherence to our holdings in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), and *Pete v. Anderson*, 413 S.W.3d 291 (Ky. 2013), that the wrongful death claims are distinct from the claims of the various estates. As the parties note, however, that question is not before us.

state statutes evince a legislative policy favoring arbitration, the existence of a binding agreement to arbitrate is necessarily a threshold consideration for a trial court faced with a motion to compel arbitration. Disposition of that issue, as both the United States Supreme Court and this Court have long recognized, implicates state law contract principles. In *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), this Court deemed an arbitration agreement signed by Ms. Ping upon her mother's admission to a nursing home unenforceable because the authority granted Ms. Ping in her mother's durable power of attorney did not extend to entering into an optional contract for arbitration. The three cases consolidated for the Court's consideration today similarly involve the scope of an agent's authority under a power of attorney executed pursuant to Kentucky law and, more specifically, whether the agent is authorized to execute an arbitration agreement on behalf of his or her principal. As in *Ping*, each agent's authority is necessarily derived from the power of attorney instrument executed by his or her principal. Not surprisingly, the three separate power of attorney instruments at issue contain differing language and require individual analysis. However, the underlying principles of state and federal law are the same in each case. Despite these principles, the majority has created a newly found rule that an agent cannot "waive" a principal's constitutional right to a jury trial unless the power of attorney contains a "specific" and "express" statement to that effect and, in doing so, the majority has wrought a change in Kentucky law-a significant change with potentially disruptive implications far beyond the relatively narrow confines of these nursing home admission cases. Furthermore, the majority has worked this change in apparent dis-

regard of the Federal Arbitration Act (FAA) and numerous decisions by the United States Supreme Court invalidating under the FAA any State rule meant to hinder the enforcement of arbitration agreements.

RELEVANT FACTS

Extendicare Homes, Inc. d/b/a Shady Lawn Nursing Home v. Whisman and Adams, 2013-SC-426-I.

On February 21, 2011, Van Adams executed a "General Power of Attorney-Durable" granting certain powers and authority to his daughter Belinda Whisman. The Whisman Power of Attorney stated in relevant part:

> I, VAN BUREN ADAMS...constitute and appoint my daughter, BELINDA WHISMAN,...my true and lawful attorney-in-fact, with full power for me and in my name and stead, to make contracts, lease, purchase, sell, encumber, or convey any real or personal property that I may now or hereafter own, to receive and receipt for money which may now or hereafter be due to me, to retain or release all liens on real or personal property, to draw, make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns; to invest or reinvest my money for me; to institute or defend suits concerning my property or rights,....

Shortly thereafter, on March 1, 2011, Adams entered Shady Lawn Nursing Home where he resided until his death on May 19, 2011. In April, 2012, Whisman and Tony Adams, as co-administrators of Adams's estate, brought suit against various defendants which owned and operated the nursing home facility (collectively referred to herein as Extendicare) for negligence, violation of the Long Term Care Resident's Rights statute, Kentucky Revised Statute (KRS) 216.510 *et seq.*, and wrongful death. In a motion to dismiss or to compel arbitration, Extendicare sought enforcement of an optional Alternative Dispute Resolution Agreement (the Extendicare Arbitration Agreement), which "Belinda Whisman POA" had executed along with several other documents at the time she admitted her father to the facility. The Arbitration Agreement stated in bold font, all-capital letters that it was "not a condition of admission to or continued residence in the center" and that by signing the parties were "giving up their constitutional right to have their disputes decided by a court of law or to appeal any decision or award of damages resulting from the alternative dispute resolution process, except as provided herein." The resident could revoke the Agreement within thirty days of signing it. The "covered disputes" subject to the Extendicare Arbitration Agreement included contract, negligence and fraud claims, statutory violations and other cognizable causes of action arising from the resident's stay in the facility.

Addressing the motion to compel arbitration, the Trigg Circuit Court concluded that Extendicare had made a prima facie showing regarding the existence of an arbitration agreement signed by Whisman but nonetheless denied arbitration. The circuit court reasoned that although the Whisman Power of Attorney

had language distinct from, and more germane than, that construed in *Ping*, it was difficult to distinguish the case from the rationale adopted by this Court in *Ping*. Extendicare sought relief from the order denying arbitration in the Court of Appeals pursuant to Kentucky Rule of Civil Procedure (CR) 65.07, but that relief was denied. The matter is now before this Court for review under CR 65.09 with Extendicare maintaining that the Arbitration Agreement is enforceable in light of the language of the Whisman POA and controlling state and federal law.

Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation v. Clark, 2013-SC-430-I.

The second appeal to reach this court involves a "General Durable Power of Attorney to Conduct All Business and Personal Affairs of Principal" executed by Olive G. Clark in favor of her daughter, Janis Clark, on August 31, 2006. The Clark POA provides in relevant part:

> I, OLIVE G. CLARK, . . .hereby constitute and appoint my daughter, JANIS ELAINE CLARK...my true and lawful attorney in fact, with full power for me and in my name, place, and stead, in her sole discretion, to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way.
>
> Without limiting or derogating from this general power, I specifically authorize my attorney in fact for me and in my name, place, and stead, in her sole discretion:

To prepare and complete administrative documents necessary to secure or preserve any and all governmental benefits available to me;
To lease, sell, or convey any real or personal property that I may now or ever own;
To mortgage my property as she sees fit;
To receive and receipt for any money which may now or hereafter be due to me;
To retain and release all liens on real or person property;
To draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds or agreements;
To invest or reinvest my money for me;
To institute or defend suits concerning my property or rights; To file all tax returns (including, without limitation, state and federal income tax returns;
To enter all safe deposit boxes;
To transfer assets of mine to any trust created by me for addition to trust principal; and
Generally to do and perform for me and in my name all that I might do if present.
Also, without limiting or derogating from this general power, I authorize my attorney in fact to make all decisions regarding my health care and medical treatment.

Olive Clark was a resident of Winchester Centre for Health and Rehabilitation from August 16, 2008 until March 30, 2009 and died on April 4, 2009. In June, 2010, Janis Clark as executrix of her mother's estate and on behalf of the wrongful death beneficiaries brought suit against the owners and operators of Winchester Centre (collectively Kindred) alleging negligence, violations of the Long Term Care Resident's Rights statute, KRS 216.510 *et seq.*, and wrongful death. Kindred filed a motion to dismiss the case or, alternatively, to stay it pending arbitration pursuant to the "Alternative Dispute Resolution Agreement Between Resident and Facility (Optional)" executed by "Janis Clark POA" on August 15, 2008. This document (the Kindred Arbitration Agreement) provided that all claims and controversies arising from the agreement or the resident's stay at the facility, including contract, tort, breach of statutory duties and other causes of action would be resolved under the agreement. The agreement stated in the first paragraph: "Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s)." In the final paragraph entitled "Resident's Understanding of Agreement," the resident (or her representative) acknowledged that the Kindred Arbitration Agreement was optional, that the resident had the right to seek legal counsel and that the agreement could be revoked within thirty days of signing by the resident or her representative.

Kindred filed a motion to compel arbitration, and in January 2012 the Clark Circuit Court issued an order dismissing the action and referring the parties to arbitration. In September 2012, after an arbitration proceeding was scheduled, Clark moved the cir-

cuit court to vacate its prior order pursuant to CR 60.02. Following oral argument, the trial court entered a new order in November 2012 vacating its prior order on the grounds that Janis Clark lacked authority to enter the Arbitration Agreement under the principles outlined by this Court in *Ping*. Kindred sought relief in the Court of Appeals pursuant to CR 65.07, but that court denied relief due to its own construction of *Ping*. The matter is now before this Court pursuant to CR 65.09 with Kindred primarily contending that the Clark Circuit Court erred in denying arbitration but also insisting that the circuit court lost jurisdiction when it dismissed the case for arbitration in January 2012, rendering invalid any attempt to revive or reassume jurisdiction later that year.

***Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation v. Wellner*, 2013-SC-431-I.**

The third case has many similarities with the *Clark* litigation. It involves the same facility, Winchester Centre for Health and Rehabilitation; the same Kindred Arbitration Agreement; the same legal claims asserted against the same Kindred defendants; the same counsel of record; the same judge of the Clark Circuit Court; and the same procedural history to the extent there was a January 2012 order dismissing the case and compelling arbitration followed by a November 2012 order vacating the order of arbitration. In this case, Joe Paul Wellner granted a "Power of Attorney" to his wife, Beverly M. Wellner, on May 15, 2008. Three months later, on August 16, 2008, Mr. Wellner entered the Winchester Centre where he resided until June 15, 2009. Following Mr. Wellner's June 19, 2009 death, Mrs.

Wellner brought a lawsuit asserting the above-referenced claims on behalf of her husband's estate and the wrongful death beneficiaries. The power of attorney pursuant to which Mrs. Wellner executed the Kindred Arbitration Agreement, while a durable power of attorney, was somewhat different than the Whisman and Clark POAs. It provided in relevant part:

> That I, JOE PAUL WELLNER,...hereby make, constitute and appoint my wife, BEVERLY M. WELLNER, as my true and lawful Attorney-in-Fact for me and in my name, place and stead:
>
> 1. To receive, take receipt for, and hold in possession, manage and control all property, both real and personal, which I now or may hereafter own, hold, possess or be or become entitled to with full power to sell, mortgage or pledge, assign, transfer, invest and reinvest the same or any part thereof in forms of investment, including bonds, notes and other obligations of the United States deemed prudent by my said wife in her discretion, with full power to retain the same without liability for loss or depreciation thereof.
>
> 2. To demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor).
>
> 3. To make, execute, deliver and endorse notes, drafts, checks and order

for the payment of money or other property from or to me or order in my name.

4. To make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance.

5. To have access to my safe deposit boxes, act as my proxy with power of substitution to vote all stocks or securities in my name in relation to any individual or corporate action, to deposit any stocks or securities in connection with any plans of prospective or reorganization committees, to accept and exercise all rights, to subscribe for securities and to sell same.

6. To receive and receipt for all rents and income to which I am or may become entitled, pay therefrom all necessary expenses for the maintenance, upkeep, care and protection of my property, deduct therefrom her own reasonable compensation, and pay the net income from time to time to me or in such manner as I shall direct, or in the absence of such payment to me or at my discretion, to invest the same for me in her judgment in the manner above described.

7. To prepare, execute and file federal or state income tax returns and other real and personal property tax lists and to pay all such taxes.

8. In the event of my illness, incapacity or other emergency to have full power to make all health care decisions for me and in my stead; this power shall encompass the power to make any decision which I might myself make in authorizing or refusing treatment, surgery or other health care. My Attorney-in Fact shall have the right to refuse the administration of nutrition and hydration.

9. If I should every need a guardian or curator or similar person or entity to assist me if I am unable to fully handle all of my affairs, and if this Power of Attorney should not be sufficient therefor, I nominate my wife, BEVERLY M. WELLNER, as my guardian, curator, etc., and I specifically provide that surety not be required on her bond as such.

10. I hereby further grant unto my Attorney-in-Fact full power in and concerning the above premises and to do any and all acts as set forth above as fully as I could do if I were personally present, and at my decease to pay, transfer and deliver over to my personal representative, all principal and income then in his possession and control, and I do ratify and confirm whatever my said Attorney-in-Fact shall lawfully do under these presents, provided however, that my attorney shall not bind me as surety, guarantor for accommodation nor give away any of my estate, whatsoever,

> nor shall my attorney be authorized to accept service of process for or on my behalf. . . .

As with the other two cases, the *Wellner* case is before the Court pursuant to CR 65.09, the Court of Appeals having denied relief under CR 65.07. Kindred raises the same issue raised in *Clark* regarding the circuit court's inability to reassert jurisdiction once the case was dismissed and ordered to arbitration but focuses primarily on the substantive issue regarding the enforceability of the Kindred Arbitration Agreement pursuant to state and federal law.

ANALYSIS

Arbitration as a means of dispute resolution in the Commonwealth dates back to at least 1799 when the drafters of Kentucky's Second Constitution included in Article VI. §10 a duty on the part of the General Assembly to "pass such laws as shall be necessary and proper to decide differences by arbitrators." All subsequent versions of our state constitution, continuing to the present one adopted in 1891, have contained this language, Ky. Const. § 250, and the General Assembly has fulfilled its duty by adopting the Uniform Arbitration Act, KRS 417.045 *et seq.* The arbitration agreements in all three cases before the Court provide that the Kentucky Arbitration Act shall govern, with the Kindred Arbitration Agreements in *Clark* and *Wellner* specifically invoking KRS 417.145 *et seq.*, and the Extendicare Arbitration Agreement invoking the law applicable in the state where the particular nursing facility is located. All three agreements also provide that in the event our state statute does not apply then the Federal Arbitration Act will govern.

Despite the invocation of our state arbitration act in the parties' agreements, only the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, is ultimately applicable in each of these cases. The Kentucky Arbitration Act cannot apply because none of the agreements comply with the Act as explained in *Ally Cat LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009), by specifying that arbitration occur in Kentucky. This inapplicability renders the FAA controlling pursuant to the express terms of the contracts. In any event, as we recognized in *Ping*, the Federal Act applies to arbitration provisions in contracts "evidencing a transaction involving [interstate] commerce." 9 U.S.C. § 2. With the United States Supreme Court having deemed health care a form of economic activity involving interstate commerce, state and federal courts across the country, including this one, have recognized that nursing home admission contracts are subject to the FAA. *Ping*, 376 S.W.3d at 589-90. *See also, Dean v. Heritage Healthcare of Ridgeway, LLC*, 759 S.E.2d 727, 732-33 (S.C. 2014); *Miller v. Cotter*, 863 N.E.2d 537 (Mass. 2007).

Under the FAA, it is incumbent upon the party seeking to compel arbitration to establish the existence of a valid arbitration agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Section 2 of the FAA provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In determining whether an enforceable agreement exists, "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). *See also Arthur Andersen LLP v. Carlisle*, 556

U.S. 624 (2009) (existence of an enforceable agreement to arbitrate necessarily depends on state law rules of contract formation). Here, as in *Ping*, the primary issue is whether an agent acting under a particular power of attorney was authorized to enter into an arbitration agreement on behalf of his or her principal.

Before turning to principles of Kentucky agency law and the specific terms of the three power of attorney instruments at issue in these cases, I note that CR 65.07 and CR 65.09 are the proper procedural vehicles for appellate review of trial court orders denying motions to compel arbitration, especially where, as here, the interlocutory appeal provision of the Kentucky Arbitration Act, KRS 417.220, is not applicable because only the FAA applies. *North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 101 (Ky. 2010). I further note that the proper construction of a power of attorney instrument is a matter of law which this Court reviews *de novo*. *Ping*, 376 S.W.3d at 590.

Kentucky has long recognized that a power of attorney should be strictly construed in conformity with the principal's purpose. *Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429, 431 (Ky. 1924). Consistent with this strict construction, our Court has held that "powers of attorney delegating authority to perform specific acts, and also containing general words, are limited to the particular acts authorized." *Id. citing U.S. Fidelity Co. v. McGinnis*, 145 S.W. 1112 (Ky. 1912). In *Ping*, we applied these age-old principles to the particular power of attorney at issue and concluded that the agent did not have authority to enter into an arbitration agreement on behalf of her principal.

The power of attorney in *Ping* was labeled a "General Power of Attorney" and began by granting authority to the agent "to do and perform any, all, and every act and thing *whatsoever requisite and necessary to be done*, to and for all intents and purposes, as I might or could do if personally present, including but not limited to the following . . ." (emphasis supplied). As we stated in our opinion:

> The document then specifically authorized several acts pertaining to the management of Mrs. Duncan's property and finances, such as "tak[ing] possession of any and all monies, goods, chattels, and effects belonging to me, wheresoever found;...receiv[ing], deposit[ing], invest[ing] and spend[ing] funds on my behalf,...tak[ing] charge of any real estate which I may own in my own name or together with other owners, legally or equitably, and to mortgag[ing], convey[ing] or sell[ing] said real estate and perform[ing] any acts necessary to mortgage, convey or sell said real estate." The document also authorized Ms. Ping "[t]o make any and all decisions of whatever kind, nature or type regarding my medical care, and to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting me; and [t]o generally do any and every further act and thing of whatever kind, nature, or type required to be done on my behalf."

Finally, Mrs. Duncan declared that it was her

> intention and desire that this document grant to my said attorney-in-fact full and general power and authority to act on my behalf and I thus direct that the language of this document be liberally construed with respect to the power and authority hereby granted my said attorney-in-fact in order to give effect to such intention and desire. The enumeration of specific items, rights, or acts or powers herein is not intended to, nor does it limit or restrict, the general and full power herein granted to my said attorney-in-fact. It is further my intention and desire that this document qualify as a DURABLE POWER OF ATTORNEY pursuant to KRS 386.093 and that the power and authority hereby granted by this document shall not be affected by any later disability or incapacity of me as principal.

376 S.W.3d at 586-87.

Beverly insisted that the general language in the preamble and the closing language regarding liberal construction and "general full power" meant that Ping was authorized to make any and all decisions on her mother's behalf, not simply the financial affairs and health care decisions specifically provided for in the power of attorney. In rejecting Beverly's argument, we cited section 37 of the *Restatement (Second) of Agency* (1958) which states in relevant part: "Unless otherwise agreed, general expressions used in authorizing an agent are limited in applica-

tion to acts done in connection with the act or business to which the authority primarily relates." 376 S.W.3d at 592. The *Ping* power of attorney instrument was very specific, being limited to financial affairs (handling Mrs. Duncan's "monies, goods, chattels, and effects" and "funds" as well as her "real estate") and making medical care decisions. In this context, we held:

> The general expressions upon which Beverly relies did not give Ms. Ping a sort of universal authority beyond those express provisions. On the contrary, even by their terms the general expressions are limited to "every act and thing whatsoever *requisite and necessary* to be done," and again to "every further act and thing whatever kind, nature, or type *required* to be done on my behalf," acts that is, necessary or required to give effect to the financial and health-care authority expressly created. These general expressions thus make explicit the incidental authority noted in section 35 of the *Restatement*:...Understood as Beverly contends, as grants of universal authority, the general expressions would tend to render the specific financial and health-care provisions superfluous, contrary to the fundamental rule that a written agreement generally will be construed "as a whole, giving effect to all parts and every word in it if possible." *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986).

> Our careful approach to the authority created by a power of attorney is also consistent with the provision in the *Restatement (Third) of Agency* incorporating the provisions cited above as follows:
>
> > (1) An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary and incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.
>
> *Restatement (Third) of Agency* § 2.02 (2006). We are not persuaded either that Ms. Ping did understand, or that she reasonably could have understood her authority under the power of attorney to apply to all decisions on her mother's behalf whatsoever, as opposed, rather, to decisions reasonably necessary to maintain her mother's property and finances and to decisions reasonably necessary to provide for her mother's medical care.

376 S.W.3d at 592. *Ping* thus applied long established principles of agency law to a power of attorney that this Court read as limited by its terms to healthcare and financial-affairs decisions and also restricted by the limiting terms "requisite" and "necessary." That power, we held, did not authorize the agent to

enter an optional arbitration agreement that could not be characterized as incidental to either the principal's health care or her finances, nor as requisite or necessary. Purporting to apply *Ping* to the three very different power of attorney instruments before us in these cases, the majority discounts the differences so as to reach a result at odds with both Kentucky and federal law requiring that arbitration agreements be enforced as rigorously as other contracts. To make clear their differences from the POA in *Ping*, differences that materially distinguish these cases from *Ping*, I turn now to the three power of attorney instruments currently before us.

I. The *Whisman* Litigation.

The Whisman Power of Attorney instrument expressly grants Whisman the authority to handle in various ways (the verbs include "lease," "purchase," "sell," "encumber" and "retain") the real and personal property of her father including specifically his "money." It then goes beyond those financial decisions or transactions pertaining to his existing or future assets and allows Whisman to "make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns. . . ." Extendicare maintains that this express language allowing for the making of contracts and agreements, standing alone, is sufficient to imbue Whisman with the authority to execute an arbitration agreement. At least two federal district courts have adopted that position, a position that is persuasive.

In *Oldham v. Extendicare Homes, Inc.*, 2013 WL 1878937, *2 (W.D. Ky. 2013), the power of attorney at issue gave the agent the authority to "draw, make and sign any and all checks, contracts, or agree-

ments." The United States District Court for the Western District of Kentucky held that "a plain reading of the power of attorney" compelled the conclusion that the agent was authorized to enter into an arbitration agreement on behalf of her principal. *Id.* at *3. That court found *Ping* distinguishable for "one obvious and significant reason: the power of attorney in *Ping* did not contain an express provision granting the attorney-in-fact authority to 'draw, make and sign any and all checks, contracts, or agreements.'" *Id.* at *5. *See also Brookdale Senior Living Inc. v. Stacy*, 27 F.Supp.3d 776, 791 (E.D. Ky. 2014) ("This express grant of power [to execute "documents" or "writings"] permitted Kim Stacy to sign the arbitration agreement;" also noting the POA at issue was "much broader" than the POA at issue in *Ping*).

When presented with powers of attorney granting the agent not only the authority to contract, but also the authority to institute and defend suits or claims, other courts have concluded an agent was authorized to enter an arbitration agreement on behalf of his principal, distinguishing *Ping* on the grounds that the power of attorney instrument in that case contained no such authority. *See, e.g., GGNSC Vanceburg, LLC v. Taulbee*, 2013 WL 4041174, *8 (E.D. Ky. 2013) (finding agent had authority to execute arbitration agreement because power of attorney included the authority to "make contracts," "draw, make and sign in my name any and all...contracts or agreements" and "institute or defend suits concerning my property or rights"); *Kindred Healthcare, Inc. v. Cherolis*, 2013 WL 5583587, *4 (Ky. App. 2013) (holding agent entered enforceable arbitration agreement when power of attorney included specific authorization "to enter into con-

tracts and to institute or defend suits regarding [the principal's] property or rights").

Addressing the same issue in yet another nursing home case in *Sorrell v. Regency Nursing LLC*, 2014 WL 2218175 (W.D. Ky. 2014), the district court elaborated on a power of attorney that included not only the authority to contract but also to institute legal proceedings.

> The case at hand is distinguishable from *Ping* in several significant ways. Most obviously, unlike the power of attorney in *Ping*, the POA here grants Bennett authority to act well beyond the categories of health care and financial decisions, including the authority "[t]o make, execute and deliver . contracts of every nature." Also unlike the power of attorney in *Ping*, the POA here grants Bennett the express authority "[t]o demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefore)." Thus, the POA gives Bennett both a broad contract authority as well as the authority to perform acts with significant legal consequences.
>
> * * * * * * * *
>
> . . . Read in light of *Ping*, the powers granted by the POA here are more than adequate to allow Bennett to execute the Arbitration Agreement and bind

> Sorrell to its terms. Although the POA does not expressly authorize Bennett to enter into arbitration agreements, the Court can find no reasonable interpretation of the POA that would limit her authority to do so on Sorrell's behalf.

Id. at 5-6.

Of course, these courts are correct about the limited nature of the power of attorney in *Ping;* it did not include either the specific authority to contract or the authority to institute and defend suits. Consequently, the focus in that case was on whether the general language in the instrument could be construed to cover executing an arbitration agreement. We noted that under section 2.02 of the *Restatement (Third) of Agency* the agent has the authority "to take action designated or implied in the principal's manifestations" and "acts necessary and incidental to achieving the principal's objectives." We were not persuaded that Ping, as agent, did understand or reasonably could have understood that her authority under the power of attorney covered "all decisions on her mother's behalf whatsoever, as opposed,...to decisions *reasonably necessary*" to maintain her mother's finances and to provide for her mother's medical care. 376 S.W.3d at 592 (emphasis supplied). Our ensuing discussion of comment h. to section 2.02, entitled "Consequences of act for principal," is probably the genesis of much of the confusion which *Ping*, unfortunately, has caused. This comment, heavily relied upon by both the majority and the Court of Appeals, noted that there are some acts with such consequences for the principal that a reasonable agent would not believe that he or she had been authorized to engage in them. In addition to "crimes and torts"

and "acts that create no prospect of economic advantage for the principal," the comment cites as a third example of such acts "otherwise legal [acts which] create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal." Comment h to section 2.02. The examples given in the comment were granting a security interest in the principal's property or executing an instrument confessing judgment. We then stated:

> We would place in this third category of acts with significant legal consequences a collateral agreement to waive the principal's right to seek redress of grievances in a court of law. Absent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly. Here, nothing in Mrs. Duncan's power of attorney suggests her intent that Ms. Ping make such waivers on her behalf.

376 S.W.3d at 593.

However appropriate that observation may have been where a litigant alleged the authority to execute an arbitration agreement can be read into general language ("any, all, and every act and thing whatsoever requisite and necessary to be done") it is certainly capable of being misleading in cases such as these where the alleged authority is premised, not on general "any and all" type language, but on an unequivocal grant of the authority to contract. The grant of an unqualified power to contract is neces-

sarily "express authorization" to agree to dispute resolution through arbitration agreement, just as a "power of attorney to settle claims and disputes," the example noted in *Ping*, would suffice.[20] Any conclusion to the contrary would run contrary to binding United States Supreme Court precedent prohibiting a state court's discrimination against arbitration in the guise of application of general principles of state law.

Section 2 of the FAA provides, as previously noted, that an arbitration contract covered by the Act "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of *any* contract. 9 U.S.C. § 2 (emphasis supplied). This section has been described as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Accordingly, the United States Supreme Court has routinely and consistently stricken state statutes and judicial holdings which place arbitration agreements in "a class apart" from contracts generally. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996). In *Doctor's*, the

---

[20] "Express *authorization* [to] address[] dispute resolution," 376 S.W.3d at 593, is not the equivalent of "express *reference*" to dispute resolution, but that is the construction that has been given to *Ping* by some courts. The adjective "express" was never intended to suggest that the power of attorney must specifically mention dispute resolution or arbitration by name but rather that there must be an express authorization (such as the express authority "to contract") from which it could be reasonably concluded that the agent had the power to act on the principal's behalf in agreeing to arbitration.

Montana statute at issue provided that an arbitration clause was unenforceable unless notice of the arbitration provision was typed in underlined capital letters on the first page of the contract. Because the first-page notice statute did not apply to "any contract," as required by 9 U.S.C. § 2, but specifically and solely to those contracts involving arbitration the *Doctor's* Court held it was preempted by the FAA. Writing for the Court, Justice Ginsburg quoted the following from *Perry v. Thomas*, 482 U.S. 483 (1987), a case striking on Supremacy Clause grounds a California statute allowing for judicial resolution of a wage collection dispute irrespective of a binding arbitration agreement:

> In *Perry*, we reiterated: '[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2].'

517 U.S. at 685.

Without exception, the United States Supreme Court has held unenforceable on Supremacy Clause grounds any legislatively-enacted or judicially-created state law which would disfavor arbitration. *See, e.g., AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (California Supreme Court's so-called *Discover Bank* rule regarding unconscionability preempted when applied in a manner that defeats arbitration in violation of FAA); *Marmet Health Care*

Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (public policy as declared by the West Virginia Supreme Court prohibiting enforcement of predispute arbitration agreements as to claims against nursing homes preempted by § 2); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (California Supreme Court's interpretation of state franchise statute as requiring judicial consideration of all claims brought under the statute preempted due to direct conflict with § 2 and resulting violation of the Supremacy Clause); *Preston v. Ferrer*, 552 U.S. 346 (2008) (FAA preempts state law granting state commissioner exclusive jurisdiction to decide issue the parties agreed to arbitrate); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (FAA pre-empts state law requiring judicial resolution of claims involving punitive damages).

Significantly, *Marmet Health Care*, 132 S. Ct. 1201, addressed the efforts of the West Virginia Supreme Court to invalidate otherwise enforceable arbitration agreements between nursing homes and their residents (or residents' representatives) based on state public policy grounded in the West Virginia Constitution and concerns about nursing home admission practices. In *Brown v. Genesis Healthcare Corporation*, 724 S.E.2d 250 (W.Va. 2011), the seventy-page opinion giving rise to *Marmet Health Care*, the West Virginia Supreme Court stated "[t]he admission agreements in this case...eliminate a fundamental constitutional right: the right of the parties to have a jury trial in the West Virginia circuit court system on the plaintiffs' personal injury claims

against the defendant nursing homes."[21] 724 S.E.2d at 270. After an extensive discussion of various access to courts provisions of the West Virginia Constitution, federal law regarding preemption of state laws disfavoring arbitration, nursing home admissions practices, and both procedural and substantive unconscionability, the Court held "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence...shall not be enforced to compel arbitration." *Id.* at 292. The United States Supreme Court's responsive, unanimous and very terse *per curiam* opinion in *Marmet Health Care*, began:

> State and federal courts must enforce the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, with respect to all arbitration agreements covered by that statute. Here, the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing that basic principle. The state court held unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes.
>
> The decision of the state court found the FAA's coverage to be more limited than mandated by this Court's previous cases. The decision of the State Su-

---

[21] This is precisely the foundation of the argument upon which the majority relies in this case.

> preme Court of Appeals must be vacated. When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established. See U.S. Const., Art. VI, cl. 2.

132 S. Ct. at 1202. Thus, the state supreme court's announced public policy against such arbitration agreements, a policy premised on state constitutional access to courts provisions, was preempted under the Supremacy Clause of the United States Constitution.

Under this clear precedent, this Court is not at liberty to conclude that in Kentucky a power of attorney that gives the agent express authority to contract does not include the authority to contract for arbitration or, stated differently, the authority to agree to give up the right to a jury trial. Any such holding would fly in the face of federal law and be preempted by the Supremacy Clause because it would clearly not be a state-law principle applicable to "any contract" but rather one that singles out arbitration agreements for disfavored treatment in the same vein as the statutes and judicially-created rules stricken by the United States Supreme Court, particularly the West Virginia Supreme Court decision stricken in *Marmet Health Care*.

In sum, the Whisman Power of Attorney, by including the express authority to contract, necessarily included the authority to contract regarding arbitration.[22] Because Whisman had the requisite authority

---

[22] It bears noting that the Whisman power of attorney included express limitations on the agent entering into certain types of contracts, to wit: "provided, however, that my said attorney is not to bind me as a surety, guarantor or indorser for accommo-

under the power of attorney instrument, the Extendicare Arbitration Agreement she signed on behalf of her father is enforceable.

II. The *Clark* and *Wellner* Litigation.

In both the *Clark* and *Wellner* litigation, as noted, before reaching the merits it is necessary to address a procedural issue created by the orders entered by the trial court when it initially referred the matters to arbitration in January 2012. The orders, tendered by Kindred's counsel, concluded with the following language: "IT IS HEREBY ORDERED and ADJUDGED that this action is hereby dismissed and the parties are ordered to resolve this dispute in accordance with the terms of the arbitration agreement executed by and between the parties." After *Ping* was released, counsel for Clark and Wellner moved to vacate the orders, and in November 2012 the trial court ruled that the cases would proceed in court instead of in arbitration proceedings. Although each November order simply stated that the prior order compelling arbitration was vacated, Clark and Wellner have argued, alternatively, that the orders were not final but, if they were, they were properly set aside or vacated pursuant to CR 60.02. Kindred maintains that once the trial court entered an order "dismissing," it lost jurisdiction and was without authority to enter the November 2012 orders. Kindred does not address the propriety of CR 60.02 relief and nor need the Court do so because under Kentucky procedural law the orders compelling arbitration were never final orders.

---

dation, nor to give away any of my estate whatsoever...." If a principal desired to give an agent the authority to contract but not the authority to agree to arbitration, express language excluding that authority could, and should, be added.

Kentucky procedural rules apply even where, as here, the Federal Arbitration Act governs the case. In *Atlantic Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (Ky. 1984), this Court held that a three-month time limitation in the FAA for filing a motion to vacate an arbitration award was not applicable in Kentucky courts because while the FAA preempts state *"substantive* law" it does not preempt state procedural rules. (emphasis in original). As Justice Leibson, writing for the majority, stated: "The [FAA] covers both substantive law *and* a procedure for federal courts to follow where a party to arbitration seeks to enforce or vacate an arbitration award in federal court. The procedural aspects are confined to federal cases." *Id.* (emphasis in original). Citing *Southland Corp. v. Keating*, 465 U.S. at 1, as this Court did in *Atlantic Painting*, as well as later United Supreme Court decisions including *Volt Info. Services v. Bd. of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 477 n.6 (1989), state courts have routinely applied their own procedural law in cases where the FAA applies. *See, e.g., Joseph v. Advest*, 906 A.2d 1205 (Pa. Super. Ct. 2006) (collecting cases); *Toler's Cove Homeowners Ass'n v. Trident*, 586 S.E.2d 581 (S.C. 2003).

Kentucky, unlike many states, does not address orders granting or denying arbitration in its Civil Rules. However, the Kentucky Arbitration Act provides in KRS 417.060(4) that "[a]ny action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration" is made under the statute. The statute further provides that "the order for arbitration shall include such stay." KRS 417.060(4). This stay of proceedings is essentially the same procedure outlined in 9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

So it is clear that under our state procedural law, the proper course for a trial court when entering an order compelling arbitration of the parties' dispute is to stay the court action, not to dismiss it.[23] Thus the trial court erred in "dismissing" these cases, and we are confronted with an obvious issue as to the consequences of that procedural misstep, *i.e.*, whether the

---

[23] I acknowledge there is a split in the federal circuit courts of appeal and that many of those courts allow their federal district courts to dismiss, rather than stay, the action if the entire dispute is arbitrable. The United States Supreme Court has not addressed whether the district courts must stay, instead of dismissing, such cases. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 87 n.2 (2000). It has held that an order dismissing *with prejudice* is final and appealable under § 16(a)(3) of the FAA because the statutory federal appeal right applies to any "final decision with respect to an arbitration." 531 U.S. at 89. Here, there is no order dismissing with prejudice but, in any event, under Kentucky procedural law an order compelling arbitration is not a final and appealable order.

orders were nonetheless final and not subject to being set aside unless the stringent standards in CR 60.02 are met. Given the longstanding and frequent reiteration in Kentucky of the rule that orders compelling arbitration are not final (and thus not immediately appealable), I cannot conclude that the trial court's use of the word "dismissing" converted what has always been an interlocutory order in our state courts into a final order.

Pursuant to CR 54.01, "[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." Manifestly, the January 2012 orders under review do not meet these criteria. They do not "adjudicate all the rights of all the parties" and they have no CR 54.02 finality language. Indeed, this Court recently held in *Linden v. Griffin*, 436 S.W.3d 521, 524 (Ky. 2014), that an order compelling arbitration is an interlocutory order and cannot be certified under CR 54.02 given Kentucky law deeming such orders inherently interlocutory. *See also, Commonwealth ex rel. Stumbo v. Philip Morris, USA*, 244 S.W.3d 116, 120 (Ky. App. 2007).

Recently, in *J.P.Morgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902, 907-08 (Ky. 2014), this Court unequivocally recognized the interlocutory nature of an order compelling arbitration, with appellate review of the trial court's order delayed until an appeal of the entire case:

> Procedurally, under state law regarding arbitration, if a court finds that as a matter of state contract law there is no arbitration agreement and denies the application to compel arbitration, the

> moving party may file an immediate appeal under KRS 417.220 (1)(a), if the agreement is subject to the Kentucky Uniform Arbitration Act, or under Civil Rule 65.09, if the agreement is subject to the Federal Arbitration Act, *see North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010). There is no like provision in the statutes to allow a party against whom arbitration is wrongfully ordered to take an immediate appeal, nor have we read the Civil Rules to allow one. Instead, any appeal of the trial court's contract decision must come in a direct appeal of the ruling after the case is final.

In *Bluegrass Powerboats*, this Court held the interlocutory nature of the order sending the case to arbitration left the trial court with discretion to revisit that order as it could any interlocutory order, even after the arbitrator had dismissed the case for an unstated reason.

The interlocutory nature of an order compelling arbitration thus has been unquestioned, with Kentucky courts frequently observing that such orders are not appealable. *See, e.g., American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 547 (Ky. 2008) *(citing Fayette Co. Farm Bureau Federation v. Martin*, 758 S.W.2d 713, 714 (Ky. App. 1998)). Given the longstanding and uniform procedural treatment of such orders, it is clear that regardless of the terminology in an order compelling arbitration the order is by its very nature an interlocutory order that is not final and appealable under Kentucky law. Just as in *Bluegrass Powerboats*, when the trial court is pre-

sented with grounds for reconsidering the order, specifically grounds that suggest there is *no* valid agreement to arbitrate, the trial court may revisit it. Consequently, the trial court, in both the *Clark* and *Wellner* cases had jurisdiction to set aside its prior order compelling arbitration without resort to CR 60.02 because the first order was never final. Turning to the merits issue of whether there was an enforceable arbitration agreement in these cases, however, and upon examination of the specific power of attorney instruments, I ultimately conclude that the original January 2012 orders compelling arbitration were correct.

The Clark Power of Attorney included the authority "to draw, make, and sign in [Olive Clark's] name any and all checks, promissory notes, contracts, deeds or agreements." Under the principles regarding an agent's express authority to contract discussed above in the context of the *Whisman* litigation, Janis Clark clearly was authorized by her mother to enter into the Kindred Arbitration Agreement. The trial court's original order compelling arbitration was correct.

The Wellner Power of Attorney also contains authority to contract but the phraseology is somewhat different: "To make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance." Whereas the Clark and Whisman Power of Attorney instruments had general authority "to contract" language that made no reference to "property," this POA instrument contemplates making "contracts of every nature in relation to both real and personal property." Given that the eventual negligence and statutory claims against

Kindred constitute a chose in action, a form of personal property, this additional "property" language does not change the nature of the agent's authority in these circumstances, *i.e.*, Mrs. Wellner was fully authorized to sign the Kindred Arbitration Agreement on behalf of her husband.

A "chose in action" is defined generally as "[a] proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort" and also as "the right to bring an action to recover a debt, money or thing." BLACK'S LAW DICTIONARY, 275 (9th ed. 2009). In *Weakley v. Weakley*, 731 S.W.2d 243, 246 (Ky. 1987), Justice Leibson, writing in dissent, observed that a "cause of action for damages for personal injury is...a chose in action....It is a valuable right which may be reduced to money damages, and as such it is a form of property acquired as of the date of the injury." Kentucky has long acknowledged that "choses in action are personal property." *Button v. Drake*, 195 S.W.2d 66, 69 (Ky. 1946). *See also, Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950) (recognizing that a cause of action is a form of personal property protected by the Due Process Clause); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (recognizing that a statutory claim under state's Fair Employment Practices Act is a species of personal property protected by the Due Process Clause).

Applying these principles, it is first obvious that the legal claims which Mr. Wellner, and ultimately his estate, had against Kindred had not accrued as of the date Mrs. Wellner signed the Kindred Arbitration Agreement. However the future nature of this form of personal property does nothing to undermine

the conclusion that the Wellner POA encompassed the authority to deal with it. Powers of attorney, by their very nature, operate in the future. Time marches on and the agent is given authority to deal with specific matters, both expected and unexpected, which the principal is not able or willing to handle. *Restatement (Third) of Agency* § 2.02 (Scope of Actual Authority) comment c. (2012) (noting that questions of interpretation as to whether an agent acted with actual authority "have a temporal focus that moves through time as the agent decides how to act"). The return on a particular investment held by the principal may diminish and require a reallocation of investments; the principal may receive an inheritance of real and personal property that must be managed; the principal's own property may be lost or damaged due to fire or a destructive storm, necessitating an insurance claim; a closely-held business in which the principal owns stock may be faced with a buy-sell situation when one owner desires to leave; a tenant in property owned by the principal may cease paying rent but refuse to vacate, necessitating an eviction action and claim to recover past rent. Just as the appropriate language in a power of attorney instrument would (and should) authorize an agent to deal with these future occurrences, a POA that allows for the authority to contract regarding "personal property" encompasses the power to contract regarding future property of the principal such as a not-yet-accrued injury claim, a future "chose in action." Thus, I would find no restriction in the Wellner Power of Attorney instrument's language that would preclude the same result reached in the other two cases; the power to "make" a contract concerning Mr. Wellner's personal property (which includes choses in action) authorized his agent to enter into the Kin-

dred Arbitration Agreement. In sum, the trial court's original order compelling arbitration was correct.

Finally, it is necessary to address at some length the majority's contention that "a ground existing at state law" imposes restrictions on agent-entered arbitration agreements, restrictions that preclude enforcement of the arbitration agreements in these cases and would do so in many other cases as well. Section 2 of the FAA, as noted above, provides that an arbitration contract covered by the Act "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The United States Supreme Court has repeatedly described the Act as "'embod[ying] [a] national policy favoring arbitration.'" *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. at 1749 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443). In *Concepcion* the Court explained that while "§ 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 131 S. Ct. at 1748. The FAA, in other words, cannot, through § 2's saving clause, "be held to destroy itself." *Id.*

Engaging in just such an exercise of statutory deconstruction, the majority contends that its patently anti-arbitration ruling[24] does not run afoul of

---

[24] The majority protests several times that arbitration is protected under Kentucky law and that its ruling does not spring from hostility toward that form of dispute resolution. These protests ring hollow, however, since every time the majority proclaims arbitration "good," it with the same breath proclaims a jury trial "better," nay sacrosanct and "God-given." Curiously, discussion of this "God-given" right includes no reference to any

this well-established federal law because "our holding does not prohibit arbitration of 'any particular type of claim.'" The problem with this rationale, apparently derived from a misreading of *Concepcion*,[25] is that prohibiting arbitration of a particular type of claim is not the only way a state law or state court holding can violate the FAA.

In *Concepcion*, for example, the state rule at issue—California's so called *Discover Bank [v. Superior Court*, 113 P.3d 1100 (Cal. 2005)] rule—did not *prohibit* the arbitration of any claim whatsoever. Instead, by deeming collective-arbitration waivers "unconscionable," the rule merely conditioned the enforcement of arbitration provisions in consumer contracts on the availability of collective arbitration. The Court held that this application of state unconscionability law violated the FAA, not because it prohibited arbitration, but because it imposed an undue burden on the enforcement of arbitration agreements, a burden that frustrated the FAA's basic purpose of ensuring parties the ability to

---

religious text. Plainly, the right to a jury trial is a human creation.

[25] The majority relies on the following passage from *Concepcion*: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 131 S. Ct at 1747. *Concepcion*, however, was not one of the "straightforward" cases. The Supreme Court went on to explain that outright prohibitions are not the only state rules at odds with the FAA. Rather, even "a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability," can violate the FAA if "applied in a fashion that disfavors arbitration." *Id.* Here, the majority has applied the venerable agency-law rule limiting an agent's actual authority to that granted by the principal "in a fashion that disfavors arbitration," and thus has violated federal law.

choose arbitration in a relatively expeditious, informal, and inexpensive form.

Interestingly for the purposes of this case, in the course of its discussion the U.S. Supreme Court explained that "a [state] court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what...the state legislature cannot.'" *Concepcion*, 131 S. Ct. at 1747 (quoting *Perry v. Thomas*, 482 U.S. at 493 n.9). As contracts, of course, arbitration agreements are distinguished by their effect on the parties' trial rights, so, as an example of an invalid unconscionability holding based on the "uniqueness of an agreement to arbitrate," the Court cited "a rule classifying as unconscionable arbitration agreements...that disallow an ultimate disposition by a jury (perhaps termed 'a panel of twelve lay arbitrators' to help avoid preemption)." The point was the same one the Court reiterated in *Marmet Health Care, i.e.*, that public policy either disfavoring arbitration directly under state law, or disfavoring it indirectly by favoring its correlative opposite—a judicial trial—whether that policy be handed down from on high or devised by judges,[26] far from exempting the state

---

[26] The majority makes much of the fact that the right to a jury trial guaranteed under Section 7 of the Kentucky Constitution is characterized in that document as "inviolate," a right to be "held sacred," the only right, the majority maintains, expressly recognized as "a divine God-given" one. The majority's invocation of a uniquely "sacred" right to a jury trial is not well-founded, as is evident if one consults the Debates of the Kentucky Constitutional Convention of 1890, where the drafters concerns were almost exclusively about whether criminal trials should require a twelve-person jury and a unanimous verdict.

As Section 248 of our Constitution makes clear (that Section allows for the departure from the sacred, ancient mode of trial by jury in "all trials of civil actions in the Circuit Courts, [where] three-fourths or more of the jurors concurring may return a verdict"), the "sacredness" of the jury-trial guarantee had much more to do with the protection it afforded criminal defendants against oppression by judges and the State than it did judicial protection of civil case plaintiffs against oppression by arbitrators.

Arguing during the 1890 constitutional debates for a relaxation in civil cases of the unanimous verdict requirement, Representative E. J. McDermott of Louisville observed that

> So long as most trials were a contest between the King and the subject, the jury was indispensable, and so long as the contest here is between the State or People and the criminal, it may be necessary to have a jury, and it may not be very wrong to require unanimity; but in a contest between Jones and Smith, why should you require a unanimous verdict of twelve men?...By requiring unanimity in juries you either compel men to violate their oaths for the sake of agreeing with others, or you cause [through hung juries] ruinous delay and expense to litigants. Litigation is now so expensive and slow that it is steadily decreasing,...We must do something to make justice cheap and sure. That, after purity of elections, is the great reform of the day. This whole matter should be left to the Legislature for experiment and improvement. There may be some reason why the Bill of Rights should secure to every criminal the right of trial by jury, but there is no reason at all for saying that, in suits between private individuals, the Legislature shall not have complete power to regulate procedure.

Official Reports of the 1890 Convention, Vol. 1 at 671-72 (Mr. McDermott). Section 248, of course, does not go so far as to give the General Assembly complete power to regulate civil procedure, but it goes far enough to show that the 1890 Convention regarded civil juries as a good deal less "sacred" than the juries in felony criminal cases.

from the FAA, was the very reason the FAA was enacted.

As noted above, another case that did not involve a State's attempt to prohibit arbitration of a particular type of claim was *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. at 681. In that case, the Court addressed a Montana statute that conditioned enforcement of arbitration clauses on the appearance, on the first page of the contract, of an underlined and capitalized notice that the "contract is subject to arbitration." Striking down the statute as violative of

---

As noted above, Section 250 of our state Constitution goes even further and requires the General Assembly to provide for arbitration, so that private litigants "may choose that summary mode of adjustment." The convention's adoption of that Section is telling in its succinctness:

> The Clerk: The next amendment is that offered by the Delegate from Boyle, by way of an additional section.
>
> The additional section was read, and is as follows:
>
> It shall be the duty of the General Assembly to pass such laws as shall be necessary and proper to decide differences by arbitrators, to be appointed by the parties who may choose that summary mode [for] adjustment.
>
> Mr. [R. P.] Jacobs [the Delegate from Boyle]: That is section ten of the present Constitution. We have no provision, so far, covering that point, and [such a provision is needed] to avoid the interpretation placed on the present Constitution by some members that we can only litigate matters by the present mode.
>
> A vote being taken, the additional section offered by the Delegate from Boyle was adopted.

Official Reports of the 1890 Convention, Vol. 4 at 4935 (Mr. Jacobs). Not only, then, does the majority's "sacred" right to a civil jury trial fail to justify the sidestepping of federal law, but it likewise fails to justify the majority's elevation of one state constitutional right above another.

the FAA, the Court explained that while state courts are free under the Act to invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, "[c]ourts may not...invalidate arbitration agreements under state laws applicable *only* to arbitration provisions....By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" 517 U.S. at 687 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974); other citation omitted). The point again is that State courts may not "'rely on the uniqueness of an agreement to arbitrate as a basis for'" denying enforcement. 517 U.S. at 687 n.3 (quoting *Perry v. Thomas*, 482 U.S. 483, 492, n.9 (1987)).

Thus, although it is true, as the majority asserts, that it has not undertaken to prohibit outright the enforcement of arbitration clauses in a particular type of claim, as the Supreme Court of West Virginia attempted to do in *Marmet Health Care*, the majority has nevertheless violated the FAA, as explained in *Concepcion* and *Doctor's Associates*, by conditioning the enforcement of agent-entered arbitration agreements on the agent's having been "expressly" and "specifically" authorized to enter such an agreement, even where the principal has authorized that agent to make contracts generally and/or to bring and settle suits on the principal's behalf. In contravention of the FAA and controlling U.S. Supreme Court precedent, the majority's specific-authorization requirement burdens agent-entered arbitration agreements more heavily than either agent-entered contracts generally, or judicial forms of agent-initiated dispute resolution.

The majority disavows, of course, any intent to single out arbitration agreements and claims merely to be creating a general rule to the effect that an agent cannot waive the principal's constitutional rights without "express" and "specific" authority to do so. Agents, however, routinely exercise, compromise, and waive fundamental constitutional rights on behalf of their principals. *Section 1* of the Kentucky Constitution, for example, includes among each person's "inherent and inalienable rights," "[t]he right of acquiring and protecting property." And Section 19 guarantees that no law shall be enacted "impairing the obligation of contracts." Agents, of course, make innumerable decisions implicating and compromising the principal's fundamental rights to enter particular contracts and to acquire and protect particular forms or items of property, and they do so on the basis of general grants of authority to contract and to handle property.[27] Remembering that

---

[27] The majority rejects the nursing homes' contentions in these cases that the agents had authority to enter the arbitration agreements under power-of-attorney provisions providing that the agent could contract on behalf of the principal, could bring suit for the principal or settle the principal's disputes, or could "do anything' the principal could do. I tend to agree with the majority that the "do anything" POA provisions are the least helpful since they obviously do not mean what they purport to say. Clearly there are things the principal could do that are beyond any reasonable understanding of the agent's authority. What such a provision actually means, then, becomes a difficult question for agents and courts alike. I need not address the "do anything" provisions in these cases, however, because the POAs in dispute include the specific provisions allowing the agent to contract and to bring suit, provisions which in my view authorize the arbitration agreements at issue.

Although it is obliged to engage in a good deal of hair-splitting to get there, the majority concludes that the "contract" and

"suit" provisions, like the "do anything" provisions, do not "specifically" and "expressly" authorize pre-dispute agreements to arbitrate, *i.e.*, to waive a jury trial, and thus did not authorize the arbitration agreements before us. This is at odds with Section 33 of the *Restatement (Second) of the Law of Agency*, p. 115 (1958) which provides that

> An agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as he knows or should know them at the time he acts.

Certainly there could be facts counseling otherwise, but in general, it seems to me (even aside from the FAA), an agent is not unreasonable if he understands his or her general authority to contract to include the authority to make arbitration contracts. Similarly, an agent with written authority to sue and to settle disputes is not unreasonable if he believes that authority encompasses such alternatives as pre-dispute arbitration agreements.

The majority's new rule is also inconsistent with Section 2.02 (Scope of Actual Authority) of the *Restatement (Third) of Agency*. In pertinent part, that Section provides that

> (1) An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.

As the commentary to this Section points out, the interpretation of an agent's actual authority, even if manifested in a written document such as the POAs before us, is not the same thing, and should not be approached in the same manner as the interpretation of a contract: questions about an agent's actual authority "focus[] on the reasonableness of one party's [the agent's] belief" at "the time the agent decides what action to take," "questions of contractual interpretation," on the other hand, "focus on the parties' shared meaning as of the time of a promise or agreement." Section 2.02 comment c. Thus, even if the majority's highly technical parsing of the POAs before us could be deemed appropriate in a contractual context, it is not

corporations necessarily act exclusively through agents and that corporations have pertinent constitutional rights (*e.g.*, acquiring and disposing of property), if the majority's new rule requiring "express" and "specific" authority for an agent to compromise the principal's constitutional rights were truly meant to apply generally, then to say that the majority has revolutionized our agency law would be a gross understatement.

If, as is more likely, the majority's new rule is not really meant to apply to state constitutional rights generally, then to which constitutional rights does it apply? As noted above, the majority seems at some points in its discussion to suggest that its new "express"-and- "specific"-authority rule applies only to "sacred" constitutional rights, of which, according to the majority, Kentucky has but one—the right to a jury trial. Thus understood, the new rule's disruption of our agency law would be minimized, but if the new rule applied only to that one right, *the one right that just happens to be correlative to the right to arbitrate*, then the rule would clearly run afoul of the FAA, because it would operate disproportionately, if not exclusively, to prevent the enforcement of arbitration

---

appropriate here. To reiterate, focusing, as we should, on what the POAs would communicate to an ordinarily reasonable agent, the general grants of authority to contract and to "bring suit" authorize the disputed arbitration agreements.

Hair splitting aside, my focus is not the majority's narrow reading of these particular POAs, but rather the majority's new rule (a rule that largely renders irrelevant the rest of its analysis) that an agent's authority to enter an arbitration agreement on behalf of the principal requires some special, "express" and "specific" manifestation of the principal's consent. By singling out and imposing extra burdens on agreements to arbitrate, the majority's new rule violates the FAA.

agreements. It would, in disregard of controlling Supreme Court precedent, "rely on the uniqueness of an agreement to arbitrate as a basis for denying enforcement." *Concepcion, supra; Doctor's Associates, supra* (citation and internal quotation marks omitted).

Hoping to avoid that outcome, the majority also says that its new "express"-and- "specific"-authority rule applies "generally" to "fundamental constitutional rights." It does not attempt to define that term (so again we confront at least a potential upheaval in our agency law), but it presumes, by way of illustration, that POAs such as those involved in these cases could not be construed to authorize the agent to "enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude." Nor, the majority asserts, would these POAs authorize the agent "to enter a plea agreement pleading his principal guilty to a criminal offense," or waive the principal's rights "to remain silent in the face of police questioning; to have the assistance of counsel during a trial; to plead guilty to a crime and thereby waive his right to a trial."

The majority makes these assertions without citing any authority,[28] but accepting these assertions as correct—that a garden variety POA such as those at

---

[28] Clearly many of the actions referred to by the majority are precluded by controlling substantive law, *e.g.* the vast body of federal and state law regarding a knowing and voluntary guilty plea.

issue here would not authorize the agent to commit the principal to an arranged marriage, to personal servitude, or to a criminal conviction—that fact does not lead to the conclusion the majority wants to draw: that an agent's committing a principal to arbitration is just as outrageous and as worthy of judicial skepticism and intervention as an agent's committing a principal to an arranged marriage, personal servitude or a criminal conviction. To state the comparison as the majority does is to make plain the hostility to arbitration that gives rise to it.

The difference between arbitration and the majority's parade of horribles is obvious. Unlike the majority's examples, all of which suppose the waiver or compromise of a basic, personal substantive right (rights that an ordinary attorney-in-fact is rarely, if ever, asked to address on the principal's behalf), arbitration agreements, which are commonplace these days, involve no substantive waiver. The principal's substantive rights remain intact, only the forum for addressing those rights is affected. The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive substantive rights) is the very presumption Congress sought to counteract with the FAA. *Southland Corp. v. Keating*, 465 U.S. at 14 (discussing Congress's intent to counteract "common law hostility toward arbitration").

Thus, while it may well be possible to frame a rule under state law to the effect that a presumption exists against an agent's authority to waive certain substantive rights of the principal, it does not follow that state law would include the right to civil trial among those presumptively non-waivable rights; and

even if, as the majority would have it, the state rule did purport to hold sacrosanct the principal's right to trial in civil cases, under *Concepcion* and the FAA, the saving clause of which is not to be construed as a self-destruct mechanism, that aspect of the state rule would be preempted by federal law. As noted already several times, and as the United States Supreme Court has made absolutely clear, what state law cannot do directly—disfavor arbitration—it also cannot do indirectly by favoring arbitration's correlative opposite, a judicial trial. Since that is the express purpose of the rule the majority pronounces and since the application of that rule will clearly have a disproportionate effect on the ability of agents to enter arbitration agreements (as opposed to other contracts), the majority's new rule is plainly invalid.

In addition to the disregard of the Supremacy Clause and controlling precedent from the U.S. Supreme Court, the majority's new rule disregards our own Kentucky practice governing jury trials. Pursuant to CR 38.02, a litigant must "demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." More notably, CR 38.04 provides that '[t]he failure of a party to serve a demand as required by this rule and to file it as required by Rule 5.05 constitutes a waiver by him of trial by jury." This rule has governed practice in Kentucky courts since its adoption in 1953. *See, e.g. Loy v. Whitney*, 339 S.W.2d 164 (Ky. 1960) (right to jury trial waived unless timely written demand filed and served in accordance with rule); *Empire Metal Corp. v. Wohlwender*, 445 S.W.2d 685 (Ky. 1969) (same); *Louisville & Jefferson Co. Metropolitan Sew-*

er Dist. v. Bischoff, 248 S.W.3d 533 (Ky. 2007) (explaining that CR 38's waiver provision does not conflict with Section 7 of the Kentucky Constitution). Just how "sacred" can the civil jury trial right be when our own court rules deem it waived unless a party promptly demands it in writing? Without question the right to a jury trial in a civil case is an important one, but the majority's new rule requiring an "express"-and- "specific" waiver of that right before an agent acting pursuant to a broad power of attorney can enter into a valid arbitration agreement elevates the civil jury right to a heretofore unrecognized status.

State courts, the U.S. Supreme Court recently observed, are called upon more frequently than federal courts to apply the FAA. "It is a matter of great importance, therefore," the Supreme Court continued, "that state supreme courts adhere to a correct interpretation of the [FAA] legislation." *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012). The Supreme Courts in California *(Concepcion)*, West Virginia *(Marmet Health Care)*, and Oklahoma *(Nitro-Lift)* have recently disregarded that responsibility and attempted, with predictable results, to "rule around" the FAA. Credit the majority with a clever contribution to this new genre. Whether one sympathizes with the majority's dislike of federally imposed arbitration or not, the inescapable fact remains that the majority has disregarded controlling law.

In sum, a power of attorney instrument that gives the agent authority to make contracts generally on behalf of his or her principal, and even one that allows the agent to execute contracts regarding the principal's personal property, necessarily includes

the power to enter into an arbitration agreement. Accordingly, this Court should grant the motions of Movants Extendicare and Kindred for interlocutory relief pursuant to CR 65.09 and remand these cases to their respective courts with instructions to enter an order compelling arbitration in each case.

Minton, C.J.; and Noble, J., join.

NOBLE, J., DISSENTING: Although I agree with some points made by the majority, which are actually not at issue in these cases, I concur with Justice Abramson's dissent. I dissent from the majority's holding that crafts a rule requiring special treatment of the right to a jury trial that conversely treats the right to arbitrate as a lesser process when the United States Supreme Court has held that it is at least an equal process of dispute resolution, if not a preferred one, under the Federal Arbitration Act (FAA). Justice Abramson has pointed this out at some length and I will not repeat her analysis here. I also cannot see that this elevation of the right to trial by jury actually affects the *formation* of a contract to arbitrate, which is essentially the only question left to state law after *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011). At least, if it does, it does so by fiat.

And, I take issue with the majority's listing of other possible acts, such as binding a principal to personal servitude, to demonstrate the grave harm that comes from allowing an agent to make important decisions on behalf of a principal, as nothing more than a non sequitur, or irrelevant speculation, because none of the events suggested in any way compares with making a logical and legal decision to allow for the arbitration of disputes. Of course an agent may not do that which is illegal, nor under his

fiduciary obligations can he act against his principal's best interest, which all the examples listed would certainly be. Our law already allows for a remedy if an agent so forgot him or herself, including criminal prosecutions and civil damage awards. I cannot see entering into an arbitration agreement rather than choosing a trial by jury as in any way comparable. There is simply no "horse" to be let out of the "barn" here.

I write separately, however, to state my view on agency law as applied in these important cases, which has become needlessly confused since this Court's decision in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012).

First, I acknowledge that there are thorny state-law questions regarding the formation of a binding arbitration agreement after the U.S. Supreme Court's decision in *Concepcion*. But what that case makes clear is that a state may not make statutory or case law determinations that serve to limit the use of arbitration agreements under the FAA. As a federal statute, that Act obviously enjoys the protection of the Supremacy Clause of the United States Constitution. Any state statute or case holding that is contrary to the application of the FAA cannot stand.

But even in *Concepcion*, the Supreme Court recognized, as Justice Abramson points out, that *whether* an arbitration agreement has been created is a state-law contract-formation question. This Court has addressed this question in several cases, but most distinctly in *J.P.Morgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902 (Ky. 2014). In that case, the trial court had to determine if the parties had entered into an arbitration agreement to resolve bank-account disputes through arbitration

rather than access to court. The trial court first held that there was such an agreement, but later revisited that decision and concluded that there was not. This Court upheld that conclusion, finding that not only did a trial court have the legal authority to revisit any interim order, but that it also had the authority to say whether an arbitration agreement had been formed in the first instance. This conclusion cemented the rule in Kentucky, as recognized by the U.S. Supreme Court, that the formation of an arbitration agreement is a matter of state contract law.

It is significant that arbitration agreements at heart are nothing more than that: agreements. The theory behind promoting arbitration is that it is viewed as a faster, less complicated proceeding than going through the full panoply of rights and procedures attendant to a trial either to the court or to a jury. This may or may not be true, but the decision to avoid court by entering into an arbitration agreement is wholly a matter of personal contract between two persons or entities. It is simply an agreed-upon *choice* as to how a dispute is to be decided. It is not compelled, any more than a citizen is compelled to seek redress in court. This freedom to choose is the essence of contract.

And, giving due deference to the Supremacy Clause and the FAA, if a person has properly entered into an arbitration agreement, then it is enforceable, as any other contract would be.

There can be no dispute that if any of the principals in these three cases had competently entered into an arbitration agreement, he or she would be bound. These cases are complicated by the fact that the agreements in question were not first-party agreements, but instead were made by persons act-

ing under powers of attorney for their principals. So this Court is confronted not with one legal question, but two. First, is the agent empowered to make such an agreement for the principal in these cases? Second, having entered into the agreements, are they binding on the principle and the attorney in fact (or agent)? The two questions are intertwined, but both inquiries must be answered.

All three powers of attorney at issue in these cases purport to be general, durable powers of attorney. It has long been the agency law in Kentucky and elsewhere that the language in the power of attorney expresses the intent of the principal in regard to what authority the agent has. A *general* power of attorney is designed to allow the agent to take care of the principal's affairs while the principal is absent or unable to act, and is viewed as giving the agent the power to do anything that the principal could do if he were acting instead. At times, a general power of attorney will use broad language granting authority to the agent, but then specifically state (and often say "but not limited to") some specific powers that are included under that grant. General powers of attorney may also contain specific limitations on otherwise broad authority, such as a specific statement saying that the general power does not include a specified action. Other powers of attorney may be *specific* powers of attorney, such as a power to buy cotton, even though the agent may be given unfettered authority to act in regard to buying cotton. These grants of authority to an agent have long been in use. *Durable* powers of attorney were created by statute to survive the incapacity of the principal, and enable the principal's wishes to be carried out even if he or she is unable to act themselves; they are often combined with general powers of attorney.

All three powers of attorney in these cases grant very broad authority followed by specific statements about that authority. The Whisman power gives his agent "full power for me and in my name and stead, to *make contracts*, ... [and] to institute or defend suits concerning my property or rights," (emphasis added), among other grants. The Clark power grants her agent "full power for me and in my name, place and stead, in her sole discretion, to transact, handle, and dispose of all matters affecting me and/or my estate *in any possible way.*" (Emphasis added.) It also specifically grants the agent the power to *make contracts*, and "[g]enerally to do and perform for me and in my name all that I *might do* if present." The Wellner power gives the agent the power to act "as my true and lawful Attorney-in-Fact for me and in my name, place and stead" and then specifically provides that his agent may "demand, sue for, collect, recover and receive all debts, monies, interest, and *demands whatsoever* now due or that may hereafter be or become due to me including the right to institute *legal proceedings* therefor," (emphasis added), among other things. It is difficult to conceive that these powers of attorney, broad as they are even in the specified statements, do not include the authority to decide on an alternative way to resolve a dispute and to enter into an agreement to do so in the best interest of the principal.

And this is true, even in the face of longstanding Kentucky law that powers of attorney must be strictly construed, and that a power of attorney delegating authority to perform specific acts is limited to the specific *purpose* authorized. The *actual language* of these powers can only be read to allow such a choice unless a court does as the majority has done by excepting out the state right to a jury trial. Clearly, the

United States Supreme Court has seen no conflict between the FAA and the Seventh Amendment right to a trial by jury.

But this does not mean that if a power of attorney specifically lists actions that are *included* in a general power, or limits the full general exercise of power by a specifically stated limitation, that this transforms the general power of attorney into a specific power of attorney, which has become the unfortunate reading of our holding in *Ping*.

In retrospect, it has become clear to me that while this Court reached the right result in *Ping*, at least half of the reason we gave for reaching that result was not actually correct. We relied on a line of cases applying the rule of strict construction of powers of attorney to read a limit into general powers of attorney that list specific powers, even though specific powers were illustrative. The problem is that the strict-construction rule originated in cases that addressed *specific* powers of attorney, and held that general language accompanying what was otherwise a specific grant of power should be read strictly so as not to expand the agent's authority beyond that intended by the principal.

Among the earliest cases to lay out this rule of strict construction (both of which are cited by the majority) are *Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429, 431 (Ky. 1924), and *U.S. Fidelity Co. v. McGinnis*, 145 S.W. 1112 (Ky. 1912). Unlike in the cases now before this Court, those cases involved *specific* powers of attorney granting limited powers. In *Harding*, for example, the agent was appointed "to act for it [the bank] in all respects in its behalf in a suit against the Kentucky River Hardwood Company and other, with full power to sign in its name a bond

for costs and do other acts necessary." 265 S.W. at 431. The Court applied the strict-construction rule to mean that the agent could not settle or discount the claim and was limited only to signing the bond. In *McGinnis*, the agents in question had a power of attorney giving them authority to execute bonds in judicial proceedings (the principal, United States Fidelity & Guaranty Company, was in the surety business). 145 S.W. at 1113. The Court applied the strict-construction rule to this power of attorney to mean that the agents could not enter into other types of agreements, such as an agreement that another surety would be on a bond temporarily and would be released upon the execution of a bond by the principal surety company.

In these cases, the attorneys in fact, the agents, were given authority to engage in certain types of transactions. This is common in the business world. Most people encounter this type of relationship when buying insurance from an agent of an insurance company. That agent no doubt has a limited authority to engage in certain types of transactions, usually the selling of insurance products. It makes sense to apply a rule of strict construction to whatever power of attorney controls the relationship between that agent and the principal insurance company. Otherwise, fleeting general language, added only to clarify that the agent may do what is necessary to carry out the specifically directed or authorized task, could swallow the entire principal-agent relationship.

But in these cases, unlike some we have recently decided, such as *Ping*, we have been dealing with general powers of attorney, usually executed by a person concerned about becoming incapacitated, delegating to the agent the power to manage the per-

son's affairs as a whole. Using the cases laying out the strict-construction rule to support our conclusion in *Ping* has caused confusion with respect to powers of attorney. In *Ping* we concluded that the enumeration of specific categories of decisions—financial and healthcare—along with language giving the agent the power to do acts that were "requisite and necessary to be done" and "required to be done" limited the scope of the authority that was granted. *Id.* at 591-94. That language is being read by lawyers and several courts to say that if specific powers are enumerated in a power of attorney, the scope of the power is limited to those enumerated acts, as a broad principle of agency law, regardless of whether the power of attorney was intended to be a general one aimed at giving the agent full authority to conduct the principal's affairs.

What the Court should have placed more emphasis on in *Ping* is the "requisite and necessary to be done" and "required to be done" language that qualified the otherwise general grant of "full and complete power and authority to do and perform any, all, and every act and thing whatsoever." *Id.* at 590-91. Because it was not requisite or necessary for the agent to enter into the arbitration agreement—the nursing home said so in its documents—we found that the agent exceeded the reasonable interpretation of the power by so doing, but also held that this interpretation of the scope of the power was colored by the specific grants of power enumerated in the instrument.

The principal in *Ping* was 79-year-old Alma Duncan, who was eventually incapacitated by a stroke. Before her incapacity, she executed a general, durable power of attorney naming her daughter, Donna Ping, as her agent (or attorney in fact). The daugh-

ter, in the course of admitting her mother to a nursing home after the stroke, signed an optional arbitration agreement as part of the admissions paperwork.

Although the power of attorney under which she acted described itself as a general one, it contained both general and specific elements, which gave rise to the dispute. As noted above, the document began by stating that the daughter had authority "to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done, to and for all intents and purposes, as [the principal] might or could do if personally present." *Id.* at 586. Boiled down, this seemingly broad grant (any, all, and every act) was to do all things "requisite and necessary."

But the document then stated that the acts and things the daughter could do "includ[ed] but [were] not limited to" certain kinds of financial decisions (some broadly worded) and healthcare decisions.[29]

---

[29] We described this portion of the power of attorney as follows:

The document then specifically authorized several acts pertaining to the management of Mrs. Duncan's property and finances, such as "tak[ing] possession of any and all monies, goods, chattels, and effects belonging to me, wheresoever found; ... receiv[ing], deposit[ing], invest[ing] and spend[ing] funds on my behalf; ... tak[ing] charge of any real estate which I may own in my own name or together with other owners, legally or equitably, and ... mortgag[ing], convey[ing] or sell[ing] said real estate and perform[ing] any acts necessary to mortgage, convey or sell said real estate." The document also authorized Ms. Ping "[t]o make any and all decisions of whatever kind, nature or type regarding my medical care, and to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting me; and [t]o generally do any and every further act and thing of whatever kind, nature, or type required to be done on my behalf."

This Court read these specific included grants as limiting the overall scope of the daughter's authority, relying on law stating that "general expressions used in authorizing an agent are limited in application to acts done in connection with the act or business to which the authority primarily relates," and that "[t]he specific authorization of particular acts tends to show that a more general authority is not intended," *Id.* at 592 (quoting Restatement (Second) of Agency § 37 (1958)).

However, reading those specific grants as *limits* on the agent's authority, standing alone, does not comport with the express language of the power of attorney, which stated that its broader grant included *but was not limited* to the specific actions listed. And later, the power of attorney again expressed the principal's "intention and desire that this document grant to my said attorney-in-fact full and general power and authority to act on my behalf and I thus direct that the language of this document be liberally construed with respect to the power and authority hereby granted my said attorney-in-fact in order to give effect to such intention and desire." *Id.* at 587. The power of attorney then stated: "The enumeration of specific items, rights, or acts or powers herein is not intended to, nor does it limit or restrict, the general and full power herein granted to my said attorney-in-fact." *Id.*

With this language in the power of attorney, *Ping* cannot be read to say that simply including specific grants of authority in a power of attorney neces-

---

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 586-87 (Ky. 2012) (alterations in original except last ellipsis).

sarily limits the power to just those enumerated things. To do so would create a conflict between the elements of the power of attorney, the objects or transactions directed by the document, and the instructions on how those objects or transactions are to be carried out. The Third Restatement, which I think accurately states the law that applies, notes that "[m]ost conferrals of authority combine two elements." Restatement (Third) of Agency § 2.01 cmt. c (2006). The first, "always present," lays out the objects of the agency relationship, or "a manifestation, however general or specific, by a principal as to the acts or types of acts the principal wishes to be done." *Id.* To use a hard-worn example, if the document directed and authorized the agent to sell Blackacre, the sale of that land would be the object of the agency relationship.

"The second [element], less invariably present, consists of instructions or directives that specify how or within what constraints acts are to be done." *Id.* The specific examples of acts authorized to the daughter in *Ping* fell in this latter category. They were "included" examples, not limits, on her authority, and could reasonably be read only to guide the exercise of her authority. The first element, the object of the power of attorney, was a general grant of authority to act in the mother's stead. Indeed, that was the overarching purpose of the document, which was intended to be a durable power of attorney for a mother who was 79 years old and faced the constant danger of succumbing (and, in fact did succumb) to incapacity. The document was not intended to allow the daughter only to engage in a limited list of activities, which might mean many important, if not essential, tasks were beyond her reach, but to allow her to manage her mother's affairs generally, even if

a given task was not included in the list of examples, during a period of incompetency.

This comports with the account of the law in the Second Restatement, on which we relied in *Ping*. Section 37 of the Second Restatement states that "general expressions used in authorizing an agent are limited in application to acts done in connection with the act or business to which the authority primarily relates," and that "[t]he specific authorization of particular acts tends to show that a more general authority is not intended." This seems to set up the general-specific dilemma that requires examining the *entirety* of the language in the power of attorney to discern the principal's actual intent.

But the illustrations in the commentary show that *Ping* overstated the effect of this provision of the Restatement. The very first example in the commentary to Section 37 includes seemingly broad language like that here: "a clause: 'giving and granting to my said attorney authority to do all acts as fully as I might, or would do, if personally present.'" Restatement (Second) of Agency § 37 illus. 1 (1958). The power of attorney in the example, however, is "to convey Blackacre." *Id.* According to the Restatement, the broad language does not give the agent authority to do anything except "convey Blackacre in the usual manner." *Id.*

But the power of attorney in *Ping* was not limited to a specific transaction. Rather, it was intended to allow the daughter to manage *all* of her mother's affairs in her stead, especially if she was incapacitated. Section 37 of the Second Restatement has caused considerable confusion because lawyers—and courts—fail to note that a general power of attorney, especially one for the care and welfare of a person, is

not limited to a single transaction. Most likely, this is why no analogous provision was included in the Third Restatement. In fact, the Third's cross-index notes that Section 37 of the Second Restatement is covered by Section 2.02, comment e, of the Third Restatement. That comment, however, says nothing about specific language displacing general grants of power; rather, it notes that the agent's authority is limited to those things that she reasonably believes the principal has consented to. *See* Restatement (Third) of Agency § 2.02 (2006) ("An agent does not have actual authority to do an act if the agent does not reasonably believe that the principal has consented to its commission. ... Lack of actual authority is established by showing either that the agent did not believe, or could not reasonably have believed, that the principal's grant of actual authority encompassed the act in question."). In other words, the agent is to take into account all of the principal's instructions to her and must not ignore general instructions just because there are also specific ones.

Reading all of the provisions of the *Ping* power of attorney in light of this, a reasonable person would conclude that the daughter was not limited to the particular acts listed as examples. Instead, she was given "general power and authority to act on [her mother's] behalf." *Ping*, 376 S.W.3d at 587 (quoting the power of attorney). And interpreters of the document, including her daughter and the courts, were "direct[ed] that the language of this document be liberally construed with respect to the power and authority hereby granted [her] said attorney-in-fact in order to give effect to such intention and desire." *Id.*

But the "requisite and necessary" language in the opening of the power of attorney *does* add a layer

of analysis as to what the daughter or any third party could reasonably believe was required or necessary.

The object of the power of attorney in *Ping* was management of the entirety of the mother's affairs, as the mother had become incapacitated by a stroke by the time the daughter had an occasion to exercise the power of attorney. *Ping*, 376 S.W.3d at 587. The power of attorney in *Ping* was executed for exactly such a contingency, since it was expressly intended to be a durable power of attorney. *Id.* Instead of a special agent, there was a general agent in *Ping* because the daughter was authorized to conduct her mother's affairs on an ongoing basis.

Thus the "requisite and necessary" language became a limit on her discretion. "A principal may provide instructions to general ... agents that further delimit their actual authority by restricting the discretion the agent would otherwise possess." Restatement (Third) of Agency § 2.01 cmt. d (2006). In essence, the language, included at the beginning of the power of attorney, sets a boundary around the general authority otherwise described in and granted by the document. Had that language not been included in the *Ping* power of attorney, the daughter's authority would have been very broad, limited only by her fiduciary duties and the rule of reasonableness. But the language *was* included and was thus a limit on the daughter's authority: she could only engage in those acts "requisite and necessary" to be done.

Ping embraced this limit, *Ping*, 376 S.W.3d at 592, and for that reason, I cannot say that the out-

come in that case was incorrect.[30] The opening line of the power of attorney literally said that the daughter had the power to do any and all acts that her mother could do if she had been present but only if those acts were "requisite and necessary." That qualifying language cannot be ignored any more than other language in the power of attorney.

But I do believe that *Ping's* discussion of general-vs.-specific grants of authority has caused confusion among the bench and bar, who have struggled to apply the decision to powers of attorney that often purport to grant very broad powers yet list specific actions as examples of what may be done. That reading of *Ping* allows those examples to devour the general grant, thus undermining the intent of the principals and requiring that we ignore the plain language and meaning of the documents.

Applying *Ping* this way would make true general powers of attorney impossible or at least unworkable.

---

[30] I have some discomfort with the notion that the daughter's execution of the arbitration agreement did not fall within even the specific example powers in the power of attorney. It included (but was not limited to) the power "to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting me." *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 587 (Ky. 2012) (alteration in original). Although the arbitration agreement, in a vacuum, is not a health-care decision, it was clearly related to health-care decisions, as it was part of the admissions packet for a nursing home. Arbitration agreements have apparently become a *de rigeur* part of nursing-home admissions paperwork. Of course, they are usually not required for admission, and admittees (or their agents) are free to decline to sign them. I cannot say that *Ping* was wrong in concluding that this specific power covered signing the agreement, however, precisely because it was not required for the admission.

It is very difficult to draft a purely general power of attorney. The inclusion of specific examples of acts that may be done both guides the agents and answers specific questions about whether the agent has authority. But as *Ping* is being read, a drafter who includes such examples runs the risk of defeating the general power granted, leaving the agent without necessary authority. At the same time, the drafter who includes only specific grants of authority risks leaving the agent unable to act when needed. This is certainly a difficult dilemma for lawyers drafting and principals executing general powers of attorney.

At the same time, such documents, especially durable powers of attorney, are becoming more and more of a necessity for the smooth operation of a person's later life. A very large portion of the American population is either already at (the Greatest Generation) or are very near (the Baby Boomers) the point in their lives where they face incapacity from medical conditions such as Alzheimer's disease or, as in *Ping*, the devastating effects of a stroke. Many of them prepare for the management of their affairs in the event of such incapacity by executing a broad power of attorney ahead of time.

I do not believe it was ever this Court's intent to impede this process nor to change long-established general agency law. Instead, our view was simply that entering into the arbitration agreement could not be reasonably construed as required or necessary, since admission to the nursing home was not contingent upon entering into the arbitration agreement. This decision had little or nothing to do with the fact that arbitration was involved—the same analysis would apply to *any* contract an agent would

undertake for a principal under the terms of the *Ping* power of attorney.

Consequently, I join Justice Abramson's dissent for its reasoning on the main points in these cases, but I have written separately to begin correcting any confusion about agency law by the part of our *Ping* decision that was actually not determinative in the result of the case. The strict-construction rule for limited or specific powers of attorney should not be applied to defeat a general power of attorney. The cases creating that rule do not support such a broad application of the rule, nor does sound policy.

Minton, C.J., joins.

COUNSEL FOR APPELLANTS: EXTENDICARE HOMES, INC. D/B/A SHADY LAWN NURSING HOME; EXTENDICARE, INC.; EXTENDICARE HEALTH NETWORK, INC.; EXTENDICARE REIT; EXTENDICARE L.P.; EXTENDICARE HOLDINGS, INC.; EXTENDICARE HEALTH SERVICES, INC.; EXTENDICARE HEALTH FACILITY HOLDINGS, INC.; JOHN DOES 1 THROUGH 5; AND UNKNOWN DEFENDANTS

Edmund John Benson
Kathryn Todd Martin
Benson Law Offices

Jason Patrick Renzelmann
William James George
Frost Brown Todd, LLC

COUNSEL FOR APPELLEES: BELINDA WHISMAN AND TONY ADAMS, AS CO-ADMINISTRATORS OF THE ESTATE OF VAN B. ADAMS, DECEASED

Cameron C. Jehl
Carey Lynn Acerra

Robert Earl Salyer
Wilkes & McHugh, P.A.

COUNSEL FOR APPELLANTS: KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOS-

PITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; AND KINDRED HEALTHCARE OPERATING, INC.

Donald Lee Miller, II
Kristin M. Lomond
James Peter Cassidy, III
Quintairos, Prieto, Wood & Boyer P.A.

COUNSEL FOR APPELLEES: JANIS E. CLARK, EXECUTRIX OF THE ESTATE OF OLIVE G. CLARK, DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF OLIVER G. CLARK AND BEVERLY WELLNER, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF JOE P. WELLNER, DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF JOE P. WELLNER

James T. Gilbert
Coy, Gilbert & Gilbert

Richard Eric Circeo
Robert Earl Salyer
Wilkes & Mchugh, P.A.

APPENDIX C

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002113-I

KINDRED NURSING CENTERS
LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; ET AL.

MOVANTS

ON MOTION FOR INTERLOCUTORY RELIEF FROM CLARK CIRCUIT COURT ACTION NO. 10-CI-00469

v.

JANIS E. CLARK, AS EXECUTRIX OF THE ESTATE OF OLIVE G. CLARK, DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF OLIVE G. CLARK

RESPONDENT

ORDER

* * * * * *

BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

Kindred Nursing Centers Limited Partnership and others ("Kindred") bring this CR 65.07 motion and motion for oral argument seeking relief from the order of the Clark Circuit Court vacating a prior order that dismissed the respondent's action and enforced an arbitration clause. Having considered the motions and the response, and having been other-

wise sufficiently advised, the Court ORDERS the motions be DENIED.

Janis E. Clark, as executrix of the estate of her mother, Olive G. Clark, and on behalf the wrongful death beneficiaries of Olive Clark, filed an action against Kindred alleging negligence, medical negligence, wrongful death and other related claims. Kindred sought to enforce an optional arbitration agreement executed by Janis as Olive's attorney-in-fact upon Olive's admission to the nursing home. On January 9, 2012, the Clark Circuit Court entered an order dismissing the action and directing the parties to arbitration. Eight months later, Janis filed a CR 60.02 motion to vacate the January 9 order, citing *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012) cert. denied, 133 S. Ct. 1996 (U.S. 2013). On November 19, 2012, the circuit court granted the motion and vacated its order compelling arbitration, finding that Janice lacked authority to waive Olive's jury trial rights, This CR 65.07 motion followed.

The movants first assert that the circuit court lacked authority under CR 60.02 to vacate its January 9 order dismissing the action and compelling arbitration. This argument does not provide a basis for CR 65.07 relief. A trial court has discretion in deciding a CR 60.02 motion and an order granting the motion is reviewed for whether the court abused its broad discretion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002). An order granting CR 60.02 relief is generally not a final and appealable order; however, the Kentucky Supreme Court recognized a limited exception in *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007), holding as follows:

> Where a final judgment has been ordered reopened, where the disrupted judgment is more than a year old, and where the reason offered for setting it aside is allegedly an "extraordinary circumstance" under CR 60.02(f), permitting an immediate appeal helps to maintain the important balance between, on the one hand, the equitable insistence on justice at all costs and, on the other, the equally vital insistence that litigation must at some point conclude and reasonable expectations founded upon long-established final judgments must not lightly be overturned.

Unlike the situation in *Asset Acceptance*, the vacated judgment here was less than a year old and the respondent's CR 60.02 motion was vested in the broad discretion of the trial court. *See also Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010).

The movants argue that *Ping v. Beverly* was wrongly decided and that in any event, the power of attorney in this action implicitly granted the attorney-in-fact the right to arbitrate or settle disputes. The Supreme Court in *Ping* concluded that the power of attorney before it expressly provided for financial, property, and healthcare decisions and that general expressions did not expand the attorney-in-fact's authority beyond those specific provisions. The Court held that "[a]bsent authorization in the power of attorney to settle claims and disputes or such express authorization addressing dispute resolution, authority to make such a waiver [of a principal's right to seek redress of grievances in a court of law] is not to be inferred lightly. Here, nothing in Mrs. Duncan's power of attorney suggests her intent that Ms. Ping

make such waivers on her behalf." 376 S.W.3d at 593.

Kindred points to provisions in the power of attorney executed by Olive that granted Janis the authority to "draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds or agreements ... [and to] institute or defend suits concerning my property or rights," in support of its argument that Janis was explicitly or implicitly authorized to enter into the optional agreement to arbitrate. Kindred cites the recent decision of *Oldham v. Extendicare Homes, Inc.*, 2013 WL 1878937 (W.D. Ky. May 3, 2013), where the federal district court held that "an express provision granting the attorney-in-fact authority 'to draw, make and sign any and all checks, contracts, or agreements' [granted] authority to act beyond the categories of healthcare or financial decisions," including entering into an optional arbitration agreement.

While we respect the federal district court's construction of *Ping*, we nevertheless understand *Ping* differently. Significantly, in reaching its decision, the Supreme Court analyzed Kentucky law on agency and found its reasoning consistent with the *Restatement of Agency*:

> Our careful approach to the authority created by a power of attorney is also consistent with the provision in the *Restatement (Third) of Agency* . . . as follows:
>
> > (1) An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary and incidental to achieving the principal's objectives, as the agent reason-

> ably understands the principal's manifestations and objectives when the agent determines how to act.

Restatement (Third) of Agency § 2.02 (2006). We are not persuaded either that Ms. Ping did understand, or that she reasonably could have understood her authority under the power of attorney to apply to all decisions on her mother's behalf whatsoever, as opposed, rather, to decisions reasonably necessary to maintain her mother's property and finances and to decisions reasonably necessary to provide for her mother's medical care.

Of particular pertinence to this case is comment h. to *Restatement* § 2.02, headed, "Consequences of act for principal." As the comment notes,

> [e]ven if a principal's instructions or grant of authority to an agent leave room for the agent to exercise discretion, the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts. Three types of acts should lead a reasonable agent to believe that the principal does not intend to authorize the agent to do the act. First are crimes and torts, Second, acts that create no prospect of economic advantage for the principal, ... *Third, some acts that are otherwise legal create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal. A reasonable agent should consider whether the principal intended to*

> *authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment. In such circumstances, it would be reasonable for the agent to consider whether a person in the principal's situation, having the principal's interests and objectives, would be likely to anticipate that the agent would commit such a collateral act, given the nature of the principal's specific direction to the agent.*
>
> *Restatement (Third) of Agency* § 2.02 comment h. (2006) (emphasis supplied). We would place in this third category of acts with significant legal consequences a collateral agreement to waive the principal's right to seek redress of grievances in a court of law. Absent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly. Here, nothing in Mrs. Duncan's power of attorney suggests her intent that Ms. Ping make such waivers on her behalf.

Ping, 376 S.W.3d at 592-93.

We find the above-quoted language from Ping to be most relevant to our decision on the motion for interlocutory relief. The Kentucky Supreme Court clearly determined that under the power of attorney providing for financial, property, and healthcare decisions, an arbitration agreement would "create legal consequences for a principal that are significant and

separate from the transaction specifically directed by the principal." 376 S.W.3d at 593 (quoting *Restatement (Third) of Agency* § 2.02 cmt. h.).

The power of attorney executed by Olive lacked provisions granting Janis authority "to settle claims and disputes or some such express authorization addressing dispute resolution." *See Ping*. Under the rationale of Ping, the power of attorney here did not encompass the authority to waive Olive's right to seek redress in a court of law. Further, Janis brought the claims against Kindred not only on behalf of Olive's estate, but also on behalf of the wrongful death beneficiaries of Olive. The Supreme Court in Ping held that an optional arbitration agreement executed by an attorney-in-fact does not apply to the claims brought by a nursing home resident's wrongful death beneficiaries. The CR 65.07 motion is DENIED.

ENTERED: ___ /s/
JUDGE, COURT OF APPEALS

APPENDIX D

COMMONWEALTH OF KENTUCKY

IN THE CIRCUIT COURT OF CLARK COUNTY

DIVISION II

Civil Action File No. 10-CI-00469

Janis E. Clark, as Executrix of the Estate of Olive G. Clark, deceased, and on behalf of the wrongful death beneficiaries of Olive G. Clark

PLAINTIFF

v.

Kindred Nursing Centers Limited Partnership, *et al.*

DEFENDANTS

ORDER REGARDING MOTION TO COMPEL ARBITRATION

This matter is before the Court on Plaintiff's motion to vacate order compelling arbitration. Based on the motion, response, arguments of counsel, and the circumstances as a whole, the Court finds that, under the principles outlined in *Donna Ping v. Beverly Enterprises, Inc.*, ---SW3d---- (Ky. 2012), Janis Clark lacked authority to waive Olive Clark's jury trial rights. Accordingly, the arbitration agreement at issue is unenforceable, and the Court's prior Order compelling arbitration is **HEREBY VACATED**. Further, Defendants' Motion to Dismiss or in the Alternative to Stay the Lawsuit Pending Alternative Dispute Resolution Proceedings is **HEREBY DENIED**.

/s/_____

JUDGE, CLARK CIR. CT., DIV II

November 15, 2012

DATE

TENDERED BY:

/s/ _____

Richard E. Circeo (KY 90243)
Attorney for Plaintiff

APPENDIX E

COMMONWEALTH OF KENTUCKY
IN THE CIRCUIT COURT OF CLARK COUNTY
CIVIL ACTION NO. 10-CI-00469
DIVISION II

JANIS E. CLARK, as Executrix of the Estate of OLIVE G. CLARK, Deceased, and on Behalf of the Wrongful Death Beneficiaries of OLIVE G. CLARK
PLAINTIFF

v.

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION;
KINDRED NURSING CENTERS EAST, LLC;
KINDRED HOSPITALS LIMITED PARTNERSHIP;
KINDRED HEALTHCARE, INC; KINDRED HEALTHCARE OPERATING, INC;
KINDRED REHAB SERVICES, INC., d/b/a PEOPLE*FIRST* REHABILITATION;
CLARK DENNIS MCNATT, in his Capacity as Administrator of WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; and JOHN DOES, 1 through 5, Unknown Defendants

DEFENDANTS

ORDER ENFORCING ALTERNATIVE DISPUTE RESOLUTION AGREEMENT

Upon motion of Defendants, Defendants, Kindred Nursing Centers Limited Partnership, d/b/a

Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation, Kindred Nursing Centers East, LLC, Kindred Hospitals Limited Partnership, Kindred Healthcare, Inc., Kindred Healthcare Operating, Inc., and Kindred Rehab Services, Inc., d/b/a People*first* Rehabilitation, Inc., and Clark Dennis McNatt, (hereinafter collectively referred to as "Fountain Circle"), in his capacity as Administrator of Fountain Circle to enforce the arbitration agreement executed by the parties and the Court being sufficiently advised:

IT IS HEREBY ORDERED and ADJUDGED that this action is hereby dismissed and the parties are ordered to resolve this dispute in accordance with the terms of the arbitration agreement executed by and between the parties.

/s/
HON. JEAN C. LOGUE
Circuit Court of Clark County, Division II

Tendered by:

/s/
Donald L. Miller, II, Esq.
Paul A. Dzenitis, Esq.
Justin N. Rost, Esq.
REMINGER CO., L.P.A.
One Riverfront Plaza
401 West Main Street - Suite 710
Louisville, Kentucky 40202
Telephone: (502) 584-1310
Facsimile: (502) 589-5436
Counsel for Defendant

CERTIFICATE OF SERVICE

I, Clerk of the Circuit Court of Clark County, Division II, hereby certify that a true and accurate copy of the foregoing has been served upon the counsel of record.

/s/ _____

CLERK

DATE: _____

APPENDIX F

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002112-I

KINDRED NURSING CENTERS
LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.

MOVANTS

ON MOTION FOR INTERLOCUTORY RELIEF FROM CLARK CIRCUIT COURT ACTION NO. 10-CI-00472

v.

BEVERLY M. WELLNER, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF JOE P. WELLNER, DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF JOE P. WELLNER

RESPONDENTS

ORDER

* * * * * *

BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

Kindred Nursing Centers Limited Partnership and related entities ("Kindred") filed this CR 65.07 motion and motion for oral argument seeking relief from the order of the Clark Circuit Court that vacated a prior order dismissing the respondents' action

and enforced an arbitration clause. Having considered the motions and the response, and having been otherwise sufficiently advised, the Court ORDERS that the motions be DENIED.

Beverly M. Wellner filed an action against Kindred in her individual capacity; on behalf of the Estate of her deceased husband, Joe P. Wellner; and on behalf of Mr. Wellner's wrongful death beneficiaries. On January 9, 2012, the Clark Circuit Court entered an order dismissing the action and directing the parties to arbitration. Eight months later, Mrs. Wellner filed a motion to vacate the January 9 order, citing *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012) *cert. denied*, 133 S. Ct. 1996 (U.S. 2013). The circuit court granted the motion to vacate and found that Mrs. Wellner "lacked authority to waive Joe Wellner's jury trial wrights." Kindred thereafter filed this CR 65.07 motion.

The movants first assert that the circuit court lacked authority under CR 60.02 to vacate its January 9 order dismissing the action and compelling arbitration. This argument does not provide a basis for CR 65.07 relief. A trial court has discretion in deciding a CR 60.02 motion and an order granting the motion is reviewed for whether the court abused its broad discretion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002). An order granting CR 60.02 relief is generally not a final and appealable order; however, the Kentucky Supreme Court recognized a limited exception in *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007), holding as follows:

> Where a final judgment has been ordered reopened, where the disrupted judgment is more than a year old, and where the reason

> offered for setting it aside is allegedly an "extraordinary circumstance" under CR 60.02(f), permitting an immediate appeal helps to maintain the important balance between, on the one hand, the equitable insistence on justice at all costs and, on the other, the equally vital insistence that litigation must at some point conclude and reasonable expectations founded upon long-established final judgments must not lightly be overturned.

Unlike the situation in *Asset Acceptance*, the vacated judgment here was less than a year old and the respondent's CR 60.02 motion was vested in the broad discretion of the trial court. *See also Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010).

Kindred argues that *Ping v. Beverly* was incorrectly decided and that in any event, the power of attorney at issue in this action satisfies *Ping*. The Supreme Court in *Ping* concluded that the power of attorney before it expressly provided for financial, property, and healthcare decisions and that general expressions did not expand the attorney-in-fact's authority beyond those specific provisions. The Court held that "[a]bsent authorization in the power of attorney to settle claims and disputes or such express authorization addressing dispute resolution, authority to make such a waiver [of a principal's right to seek redress of grievances in a court of law] is not to be inferred lightly. Here, nothing in Mrs. Duncan's power of attorney suggests her intent that Ms. Ping make such waivers on her behalf." 376 S.W.3d at 593.

Kindred points to Mr. Wellner's granting Mrs. Wellner the authority to "demand, sue for, collect, re-

cover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor) ... [and to] make, execute and deliver deeds, releases, conveyances and contracts of every nature in relater to both real and personal property, including stocks, bonds, and insurance" for the argument that Mrs. Wellner indeed had the authority to waive her husband's right to a jury trial. Kindred maintains that its position is supported by the recent decision of *Oldham v. Extendicare Homes, Inc.*, 2013 WL 1878937 (W.D. Ky. May 3, 2013). The federal district court held in *Oldham* that "an express provision granting the attorney-in-fact authority 'to draw, make and sign any and all checks, contracts, or agreements' [granted] authority to act beyond the categories of healthcare or financial decisions," including entering into an optional arbitration agreement.

While we respect the federal district court's construction of *Ping*, we nevertheless understand *Ping* differently. Significantly, in reaching its decision, the Supreme Court analyzed Kentucky law on agency and found its reasoning consistent with the *Restatement of Agency*:

> Our careful approach to the authority created by a power of attorney is also consistent with the provision in the *Restatement (Third) of Agency* ... as follows:
>
> > (1) An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary and incidental to achieving the principal's objectives, as the agent reasonably understands the prin-

> cipal's manifestations and objectives when the agent determines how to act.

Restatement (Third) of Agency § 2.02 (2006). We are not persuaded either that Ms. Ping did understand, or that she reasonably could have understood her authority under the power of attorney to apply to all decisions on her mother's behalf whatsoever, as opposed, rather, to decisions reasonably necessary to maintain her mother's property and finances and to decisions reasonably necessary to provide for her mother's medical care.

Of particular pertinence to this case is comment h. to *Restatement* § 2.02, headed, "Consequences of act for principal." As the comment notes,

> [e]ven if a principal's instructions or grant of authority to an agent leave room for the agent to exercise discretion, the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts. Three types of acts should lead a reasonable agent to believe that the principal does not intend to authorize the agent to do the act. First are crimes and torts, ... Second, acts that create no prospect of economic advantage for the principal, ... *Third, some acts that are otherwise legal create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal. A reasonable agent should consider whether the*

> *principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment. In such circumstances, it would be reasonable for the agent to consider whether a person in the principal's situation, having the principal's interests and objectives, would be likely to anticipate that the agent would commit such a collateral act, given the nature of the principal's specific direction to the agent.*
>
> *Restatement (Third) of Agency* § 2.02 comment h. (2006) (emphasis supplied). We would place in this third category of acts with significant legal consequences a collateral agreement to waive the principal's right to seek redress of grievances in a court of law. Absent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly. Here, nothing in Mrs. Duncan's power of attorney suggests her intent that Ms. Ping make such waivers on her behalf.

Ping, 376 S.W.3d at 592-93.

We find the above-quoted language from *Ping* to be most relevant to our decision on the CR 65.07 motion. The Kentucky Supreme Court clearly determined that under the power of attorney providing for financial, property, and healthcare decisions, an arbitration agreement would "create legal conse-

quences for a principal that are significant and separate from the transaction specifically directed by the principal." 376 S.W.3d at 593 (quoting *Restatement (Third) of Agency* § 2.02 cmt. h.).

The power of attorney executed by Mr. Wellner specifically addressed property, financial, and healthcare decisions. The provisions relied on by Kindred pertain to property and financial concerns and there is no express reference to dispute resolution. Given the specificity in the power of attorney accorded to property, financial, and healthcare decisions, we cannot find that Mr. Wellner granted Mrs. Wellner the right to waive his rights to seek redress in a court of law. *See Ping*. Moreover, Mrs. Wellner brought the suit on behalf of her husband's estate and on behalf of the wrongful death beneficiaries of Mr. Wellner. In *Ping*, the Court held that the arbitration agreement does not bind the wrongful death beneficiaries. The CR 65.07 motion is DENIED.

ENTERED:

/s/ _____
JUDGE, COURT OF APPEALS

APPENDIX G

COMMONWEALTH OF KENTUCKY
IN THE CIRCUIT COURT OF CLARK COUNTY
DIVISION II

Civil Action File No. 10-CI-00472

Beverly M. Wellner, Individually, and as Administratrix of the Estate of Joe P. Wellner, deceased, and on behalf of the wrongful death beneficiaries of Joe P. Wellner

PLAINTIFF

v.

Kindred Nursing Centers Limited Partnership, *et al.*

DEFENDANTS

ORDER REGARDING MOTION TO COMPEL ARBITRATION

This matter is before the Court on Plaintiff's motion to vacate order compelling arbitration. Based on the motion, response, arguments of counsel, and the circumstances as a whole, the Court finds that, under the principles outlined in *Donna Ping v. Beverly Enterprises, Inc.*, ---SW3d---- (Ky. 2012), Beverly Wellner lacked authority to waive Joe Wellner's jury trial rights. Accordingly, the arbitration agreement at issue is unenforceable, and the Court's prior Order compelling arbitration is **HEREBY VACATED**. Further, Defendants' Motion to Dismiss or in the Alternative to Stay the Lawsuit Pending Alternative Dispute Resolution Proceedings is **HEREBY DENIED**.

/s/
JUDGE, CLARK CIR. CT., DIV II

DATE

TENDERED BY:

/s/
Richard E. Circeo (KY 90243)
Attorney for Plaintiff

APPENDIX H

COMMONWEALTH OF KENTUCKY
IN THE CIRCUIT COURT OF CLARK COUNTY
CIVIL ACTION NO. 10-CI-00472
DIVISION II

BEVERLY M. WELLNER, Individually, and as Administratrix of the Estate of JOE P. WELLNER, Deceased, and on Behalf of the Wrongful Death Beneficiaries of JOE P. WELLNER

PLAINTIFF

v.

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC; KINDRED HEALTHCARE OPERATING, INC; KINDRED REHAB SERVICES, INC. d/b/a PEOPLE*FIRST* REHABILITATION; CLARK DENNIS MCNATT, IN HIS CAPACITY AS ADMINISTRATOR OF WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; And JOHN DOES, 1 through 5, Unknown Defendants

DEFENDANTS

ORDER ENFORCING ALTERNATIVE DISPUTE RESOLUTION AGREEMENT

Upon motion of Defendants, Kindred Nursing Centers Limited Partnership d/b/a Winchester Cen-

tre for Health and Rehabilitation; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; Kindred Healthcare Operating, Inc.; Kindred Rehab Services, Inc. d/b/a People*First* Rehabilitation; and Clark Dennis McNatt, in his capacity as administrator of Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation to enforce the alternative dispute resolution agreement executed not by the parties and the Court being sufficiently advised:

IT IS HEREBY ORDERED and ADJUDGED that this action is hereby dismissed and the parties are ordered to resolve this dispute in accordance with the terms of the alternative dispute resolution agreement executed by and between the parties.

/s/ _____
HON. JEAN C. LOGUE
Circuit Court of Clark County, Division II

Tendered by:

/s/ _____
Donald L. Miller, II, Esq.
Paul A. Dzenitis, Esq.
Justin N. Rost, Esq.
Carrie A. Masters, Esq.
REMINGER CO., L.P.A.
One Riverfront Plaza
401 West Main Street - Suite 710
Louisville, Kentucky 40202
Telephone: (502) 584-1310
Facsimile: (502) 589-5436

Counsel for Defendant

CERTIFICATE OF SERVICE

I, Clerk of the Circuit Court of Clark County, Division II, hereby certify that a true and accurate copy of the foregoing has been served upon the counsel of record.

/s/
CLERK

DATE:

RECORD AND BRIEFS

FILED
SEP 6 - 2016
OFFICE OF THE CLERK

No. 16-32

In The

Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION CENTER, et al.,

Petitioners,

v.

JANIS E. CLARK, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONDENTS' BRIEF IN OPPOSITION

JAMES T. GILBERT
COY, GILBERT, SHEPHERD & WILSON
212 North Second Street
Richmond, KY 40475
(859) 623-3877

ROBERT E. SALYER
Counsel of Record
WILKES & MCHUGH, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com

Counsel for Respondents

CUCKLE LEGAL BRIEFS (800) 225-6964
WWW.CUCKLELEGALBRIEFS.COM

QUESTION PRESENTED

A power of attorney is an Agency appointment. Under Kentucky law, the scope of an agent's authority depends upon the principal's intent. Here the Kentucky Supreme Court determined the intentions of two principals in their respective powers of attorney by interpreting the meaning of the language used in the instruments. Petitioners are in effect asserting that the FAA preempts the intention of a principal as determined by the Kentucky Supreme Court, regarding the scope of Agency authority conveyed upon the agent.

The question thus presented is:

Whether the Kentucky Supreme Court's routine application of interpretive principles to an instrument of Agency, *e.g.*, a power-of-attorney, is preempted by the Federal Arbitration Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	3
I. Factual Background	3
II. Proceedings Below	7
REASONS FOR DENYING THE PETITION	12
I. There Is No Split Of Opinion Below	12
II. The Kentucky Supreme Court's Decision Does Not Implicate The FAA Or Trigger Federal Preemption	14
III. The Kentucky Supreme Court Interpreted The Powers Of Attorney In This Case According To Reasonable And Arbitration-Neutral Canons of Agency Interpretation	18
A. The Kentucky Supreme Court Interpreted The Wellner Power Of Attorney Literally According To Its Language	19
B. The Kentucky Supreme Court Interpreted The Clark Power Of Attorney According To The Revealed Intent Of The Principal, As Understood From The Standpoint Of The Reasonable Expectations Flowing From Language Used In Kentucky	20
IV. The Decision Below Is Consistent With This Court's Precedent	26

TABLE OF CONTENTS – Continued

Page

V. That This Case Comes Out Of The Kentucky Supreme Court, Rather Than The U.S. Court Of Appeals For The Sixth Circuit, Makes This Case A Poor Vehicle For Review Of The Requirements Of The FAA 32

VI. Interpreting State Agency Law In Deference To A Federal Statutory Scheme Would Have Unforeseen Negative Ramifications 33

CONCLUSION 36

APPENDIX

APPENDIX A – Petitioners' Motion for Leave to Cite Supplemental Authority (December 15, 2015) ..... App. 1

APPENDIX B – The Kentucky Supreme Court Receipt Notice (December 16, 2015) ..... App. 8

APPENDIX C – The Kentucky Supreme Court Order granting leave to cite supplemental authority, and filing the tendered authority to Petitioners' Motion for Rehearing (December 30, 2015) ..... App. 10

TABLE OF AUTHORITIES

Page

CASES

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995) 32

American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013) 33

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) ..... *passim*

Brandenburg Health Facilities, LP v. Mattingly, No. 3:15-cv-00833 (W.D.Ky. 2016) 12

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) 15, 16

Chastain v. Robinson-Humphrey Co., 957 F.2d 851 (11th Cir. 1992) 16

Clinton v. Hibbs' Executrix, 259 S.W. 356 (Ky. 1924) 1, 21, 22

DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463 (2016) 30, 31, 33

Discover Bank v. Superior Court, 113 P.3d 1100 (2005) 27, 28, 31

Doctor's Associates v. Casarotto, 517 U.S. 681 (1996) 26, 29

Donna Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012) 7, 8, 11, 22

Estate of Smith v. Southland Suites of Ormond Beach, LLC, 28 So.3d 103 (Fla. Dist. Ct. App. 2010) 13

TABLE OF AUTHORITIES – Continued

Page

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 15

Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974) 15

GGNSC Louisville Mt. Holly, LLC, et al. v. Leslie Guess Mohamed-Vall, No. 3:16-cv-00136 (W.D. Ky. 2016) 12

Granite Rock Co. v. International Broth. of Teamsters, 561 U.S. 287 (2010) 14, 15

Harding v. Kentucky River Hardwood Co., 265 S.W. 429 (Ky. 1924) 21

Hathaway v. Eckerle, 336 S.W.3d 83 (Ky. 2011) 18

Kindred Healthcare, Inc. v. Henson, 481 S.W.3d 825 (Ky. Ct. App. 2014) 21

Marmet Health Care Center, Inc. v. Brown, 132 S.Ct. 1201 (2012) 29

Michigan v. Long, 463 U.S. 1032 (1983) 17

Mills Street Church of Christ v. Hogan, 785 S.W.2d 263 (Ky. Ct. App. 1990) 21

Myers v. GGNSC Holdings, LLC, 2013 WL 1913557 (N.D. Miss. May 8, 2013) 13

Preferred Care of Delaware, Inc. v. Hopkins, No. 5:15-cv-00191 (W.D.Ky. 2016) 12

Preston v. Henning, 69 Ky. (6 Bush) 556 (Ky. 1869) 1

Rice v. Floyd, 768 S.W.2d 57 (Ky. 1989) 24

TABLE OF AUTHORITIES – Continued

Page

Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (3d Cir. 2000) 17

Schnuerle v. Insight Communications Company, L.P., 376 S.W.3d 561 (Ky. 2012) 18

Southland Corp. v. Keating, 465 U.S. 1 (1984) 32

Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003) 17

Sphere Drake Ins. Ltd. v. All American Ins. Co., 256 F.3d 587 (7th Cir. 2001) 17

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) 33, 34

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) 15, 34

Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998) 21

STATUTES

9 U.S.C. § 2 ..... 14, 15

9 U.S.C. § 4 14

28 U.S.C. § 1292 12

Ky. Rev. Stat. § 411.130 9

La. Civ. Code art. 2997 33

OTHER AUTHORITIES

RESTATEMENT (THIRD) OF AGENCY § 2.02 ..... 7, 9, 22

INTRODUCTION

In the case below, the Kentucky Supreme Court interpreted and construed the two powers of attorney at issue as not encompassing the authority for the agents to enter into pre-dispute arbitration agreements on behalf of their respective principals. The principals were nursing home residents of a single nursing home, and the agents were family members of the respective principal. The underlying disputes in their cases involve personal injury and allegations of nursing home abuse.

In one power of attorney, the Kentucky Supreme Court held that the plain language of the instrument did not encompass the authority. In the other power of attorney, the court held that the principal's intent to grant this authority could not be reasonably inferred from the language of the instrument.[1]

The lower court did not proscribe agent-made pre-dispute arbitration agreements. Rather, the Kentucky Supreme Court said this:

> Without any doubt, one may expressly grant to his attorney-in-fact the authority to bargain away his rights to access the courts and to trial by jury by entering into a pre-dispute

---

[1] The question of intent is structurally a factual question; however, in Kentucky as with other jurisdictions, determination of the intent encompassed in a power of attorney is as a matter of law, and a matter for the courts. *Preston v. Henning*, 69 Ky. (6 Bush) 556 (Ky. 1869); *see also Clinton v. Hibbs' Executrix*, 259 S.W. 356, 357-358 (Ky. 1924) (question of principal's intent a matter for the court and not a jury).

> arbitration agreement. No one challenges that.

Pet. App. 43.

The lower court determined that the agents lacked sufficient authority to execute the arbitration contracts on behalf of the principals. This case therefore does not turn on any question of Contract law, except insofar as every contract requires party authority for its execution, and the Kentucky Supreme Court made this point abundantly clear as well:

> There is no dispute that if the arbitration agreements were validly formed, they are enforceable as written under both the Kentucky Uniform Arbitration Act (KUAA), KRS 417.050 et seq., and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq., at least with respect to the decedents' claims for personal injury and statutory violations.

Pet. App. 24.

Any questions posed in this case subsist in Agency. Under Kentucky law, all powers of attorney are interpreted in accordance with "the age-old principle that a power of attorney must be strictly construed in conformity with the principal's purpose." Pet. App. 28. Moreover, under Kentucky law, the authority in a power of attorney derives from the intent of the principal. By default, in Kentucky a power of attorney confers no authority, until a court is satisfied from the principal's communication that the authority has been intentionally conferred. Whether a power of attorney

encompasses a particular transaction, a construing Kentucky court of law must gauge whether the reasonable reading of the grant of authority – as opposed to the broadest plausible reading – signifies the intention of the principal for such types of transaction to be consummated on the principal's behalf.

The Kentucky Supreme Court engaged in a routine application of interpretative principles to an instrument of Kentucky Agency in this case. The petition here seeks to involve this Court in power of attorney interpretation and construction, a task normally consigned to State law and State courts, and an area of law heretofore outside of the FAA's ambit. There is no split of opinion between the decision below and any U.S. Court of Appeals. There is no split of opinion between the decision below and any State court of last resort. As such, this Court should deny the petition for writ of certiorari.

STATEMENT OF THE CASE

I. Factual Background

Both cases involved in this petition stem out of allegations of nursing home abuse of a member of the Respondent's family (nursing home residents Joe Wellner and Olive Clark), committed by Petitioners and their nursing home facility, Winchester Centre for Health and Rehabilitation (n/k/a Fountain Circle Health and Rehabilitation Center). It was alleged, and was taken as fact by the Kentucky Supreme Court

below, that at the time of Joe Wellner and Olive Clark's admissions to Fountain Circle Health and Rehabilitation Center, the nursing home residents' respective attorneys-in-fact executed pre-dispute arbitration agreements on behalf of the resident, ostensibly pursuant to written powers of attorney. Pet. App. 6-7.

Joe P. Wellner was a resident of Fountain Circle Health and Rehabilitation Center from on or about August 16, 2008 until on or about June 15, 2009, dying on June 19, 2009. Respondent Beverly Wellner, on behalf of the Estate of her husband and on behalf of his wrongful death beneficiaries, alleged in a Complaint in the Circuit Court for Clark County, Kentucky, that at Petitioners' facility Joe Wellner sustained numerous injuries, including falls; dehydration and malnutrition; pressure sores; infections; improper wound care; severe pain; and death.

Olive Clark was a resident at this same Fountain Circle Health and Rehabilitation Center from on or about August 16, 2008 until on or about March 30, 2009, dying on April 4, 2009. While she was a resident in the Defendants' facility, it is alleged that Olive Clark also sustained numerous injuries, including falls; dehydration; skin breakdown; infections; medication errors; severe pain; and death. Respondent Janis Clark, on behalf of the Estate of her mother and on behalf of Olive's wrongful death beneficiaries, filed a Complaint against Petitioners in the Circuit Court for Clark County, Kentucky.

The written powers of attorney in question were short, one page affairs. The Wellner power of attorney provided in pertinent part:

> 1. To receive, take receipt for, and hold in possession, manage and control all property, both real and personal, which I now or may hereafter own, hold, possess or be or become entitled to with full power to sell, mortgage or pledge, assign, transfer, invest and reinvest the same or any part thereof in forms of investment, including bonds, notes and other obligations of the United States deemed prudent by my said son in his discretion, with full power to retain the same without liability for loss or depreciation thereof.
>
> 2. To demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor).
>
> 3. To make, execute, deliver and endorse notes, drafts, checks and order for the payment of money or other property from or to me or order in my name.
>
> 4. To make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance.

Pet. App. 21-23. The Clark power of attorney provided in pertinent part:

> I, OLIVE G. CLARK . . . hereby constitute and appoint . . . my true and lawful attorney in fact, with full power for me and in my name, place, and stead, in her sole discretion, to transact, handle, dispose of all matters affecting me and/or my estate in any possible way.
>
> Without limiting or derogating from this general power, I specifically authorize my attorney in fact for me and in my name, place, and stead, in her sole discretion:
>
> * * *
>
> To draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds or agreements;
>
> * * *
>
> To institute or defend suits concerning my property or rights;
>
> * * *
>
> Generally to do and perform for me and in my name all that I might do if present.

Pet. App. 18-19.

When Joe Wellner and Olive Clark were admitted to Fountain Circle Health and Rehabilitation Center, their respective attorneys in fact executed on their behalf, not only admission contracts, but also separate arbitration agreements. Those arbitration agreements themselves "provided that all claims and controversies arising from the agreement or the resident's stay at the facility, including contract, tort, breach of statutory duties and other causes of action would be resolved under

the agreement." Pet. App. 57. These agreements were optional, *i.e.*, they were neither a condition of admission nor a condition for the provision of health care at Petitioners' facility. Pet. App. 17; 20.

II. Proceedings Below

Upon motions filed in each case to compel arbitration, the Clark County Circuit Court initially ordered enforcement. However, the Kentucky Supreme Court subsequently entered a decision in the case of *Donna Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), cert. denied, 133 S.Ct. 1996 (U.S. April 22, 2013), and Respondents moved for reconsideration.

In *Ping*, the Kentucky Supreme Court held that a power of attorney, which does not contain an authorization for dispute resolution, does not encompass the power to execute an arbitration agreement. *Ping*, 376 S.W.3d at 593-594. Additionally, *Ping* specifically quoted the RESTATEMENT (THIRD) OF AGENCY § 2.02 (comment h. (2006)), which teaches that there are "[t]hree types of acts [that] should lead a reasonable agent to believe that the principal does not intend to authorize the agent to do the act." *Ping*, 376 S.W.3d at 593. These acts by the agent "will impose on the principal" unforeseen "consequences" such that the authority to engage in those acts will not be inferred. *Id.*; Pet. App. 27-28; 122-124. One category of acts are those that "create legal consequences" "significant and separate" from the primary transactions, having "major legal implications for the principal, such as granting a

security interest in the principal's property or executing an instrument confessing judgment." *Ping*, 376 S.W.3d at 593; Pet. App. 28 n.10. "We would place in this third category of acts with significant legal consequences a collateral agreement to waive the principal's right to seek redress of grievances in a court of law." *Ping*, 376 S.W.3d at 593. "Nothing in Mrs. Duncan's power of attorney suggests her intent that Ms. Ping make such waivers on her behalf." *Id.*

Upon the precedent of *Ping*, the Clark County Circuit Court vacated its earlier orders compelling arbitration, substituting therefor orders denying the motions to compel arbitration. Pet. App. 126-127; 138-139. The case below is actually a consolidation by the Kentucky Supreme Court of three separate cases from the Kentucky Court of Appeals and the Clark and Trigg County Circuit Courts. A third set of parties in the lower courts, involving an unrelated nursing home and unrelated corporate defendant-appellants, have not joined in this petition.[2] *See* Pet. App. 29-38. In all three instances, the Circuit Court reached its decision premised upon absence of sufficient transactional authority in the respective power of attorney.

Petitioners filed motions for interlocutory relief in the Court of Appeals of Kentucky. Given the Kentucky Supreme Court's decision in *Ping v. Beverly Enterprises*, *see supra*, and the reliance of *Ping* upon the

---

[2] This anomaly in the proceeding in front of this Court is one initial reason that this case does not represent the proper vehicle to resolve any issues arising in this case.

RESTATEMENT OF AGENCY, the Kentucky Court of Appeals denied relief. Pet. App. 121-125; 131-137.

Subsequent to the Kentucky Court of Appeals Orders denying relief, Petitioners appealed to the Kentucky Supreme Court. Not surprisingly, the Kentucky Supreme Court interpreted the three powers of attorney distinctively from one another, based upon their respective verbiage. Contrary to the impression perhaps left by Petitioners' petition, the Supreme Court of Kentucky did not interpret or construe any term in any arbitration agreement. Rather, the Kentucky Supreme Court's opinion is directed to interpreting the meaning and effect of words in powers of attorney.[3]

The Kentucky Supreme Court's reading of the Wellner power of attorney was straightforward. The Wellner power of attorney included language granting the attorney in fact some authority over Joe Wellner's legal affairs, and language granting the power to contract regarding property. The Kentucky Supreme Court concluded that this language did not plausibly encompass the power to execute the pre-dispute arbitration contract on behalf of the principal. The instrument language that included "the right to institute legal proceedings" to recover money was insufficient

---

[3] Additionally, the lower court held (as it had in the past) that, pursuant to Kentucky's wrongful death statute, Ky. Rev. Stat. § 411.130, decedents do not have the authority to bind their wrongful death beneficiaries to arbitrate a wrongful death claim. Pet. App. 8-12. Under Ky. Rev. Stat. § 411.130 the decedent has neither a legal nor an equitable interest in the wrongful death claim.

because, self-evidently, executing a pre-dispute arbitration agreement is not itself the institution of a legal proceeding. Pet. App. 35-36. And while a chose-in-action is property under Kentucky law, the arbitration agreement was at its most fundamental an exchange involving the parties' rights, rather than an exchange with reference to their property. It would be objectively implausible to characterize the execution of a pre-dispute arbitration agreement as a property transaction. Pet. App. 36-38.

The Kentucky Supreme Court determined that the Clark power of attorney did plausibly encompass the power to execute the pre-dispute arbitration contract on behalf of the principal, given the instrument's broad language. The instrument language grants the attorney-in-fact power "to do and perform for me and in my name all that I might do if present," as well as granting general authority to execute contracts. Nonetheless, the Kentucky Supreme Court determined that it was not objectively reasonable to interpret the Clark instrument language as including the Agency power to execute pre-dispute arbitration contracts on behalf of the principal. Pet. App. 38-39. The Supreme Court took the position that the meaning of a Kentucky power of attorney is not determined by the broadest inferences that can be drawn from its words; rather, a Kentucky power of attorney's meaning derives from the readable intentions of the principal. Pet. App. 39. A universal but generally-worded grant of Agency was insufficient to demonstrate that the principal had manifested the

intention for the attorney in fact to have the power in question.

The Kentucky Supreme Court considered the Kentucky Constitution's characterization of the right to trial to inform the principal's reasonable expectations of language in Kentucky instruments. Pet. App. 41-43. The Kentucky citizen-principal, being master over his or her own legal affairs, does not evince an intention for an agent to have the ability to take that principal out of the legal system vis-à-vis another party, in an irrevocable and unbreakable perpetual agreement, unless the principal specifically grants the agent this power. *See* Pet. App. 43.

There were two Dissenting Opinions. Justice Abramson wrote one Dissent, joined by Chief Justice Minton and Justice Noble. Justice Abramson had authored the *Ping* Opinion, and she attempted to distinguish its circumstances from those of Wellner and Clark. *See* Pet. App. 84.

Justice Noble additionally also wrote a Dissent, joined by Chief Justice Minton. She wrote separately to point out what she considered to be a general error in the Kentucky Supreme Court's power of attorney jurisprudence. She contended that the Kentucky Supreme Court was in effect erroneously converting general powers of attorney into specific powers of attorney by limiting general powers of attorney to the illustrative powers recited in the instrument. Pet. App. 109; 111-112.

REASONS FOR DENYING THE PETITION

I. There Is No Split Of Opinion Below.

Again, there is no split of opinion between the decision below and any U.S. Court of Appeals or other State supreme court regarding any issue addressed by the lower court here. Only one U.S. District Court has addressed this issue and the lower court's decision. Even as the U.S. District Court for the Western District of Kentucky has chosen not to follow the State Supreme Court's holding on the proper interpretation of Kentucky powers of attorney, the U.S. Court of Appeals for the Sixth Circuit has yet to address the issue.

Most of the U.S. District Court cases from the Western District of Kentucky cited by Petitioners have been appealed to the Sixth Circuit. *See, e.g.*, *Brandenburg Health Facilities, LP v. Mattingly*, No. 3:15-cv-00833 (W.D. Ky. 2016), *appeal docketed*, No. 16-6168 (6th Cir. Jul. 19, 2016); *Preferred Care of Delaware, Inc. v. Hopkins*, No. 5:15-cv-00191 (W.D. Ky. 2016), *appeal docketed*, No. 16-6180 (6th Cir. Jul. 22, 2016); *GGNSC Louisville Mt. Holly, LLC, et al. v. Leslie Guess Mohamed-Vall*, No. 3:16-cv-00136 (W.D. Ky. 2016), *appeal docketed*, No. 16-5606 (6th Cir. May. 5, 2016). The Sixth Circuit will have appellate jurisdiction to hear these interlocutory appeals, at the very least inasmuch as the U.S. District Court orders also include injunctive relief. Injunctive relief entitles those appellants to an appeal as of right regarding the injunction, 28 U.S.C. § 1292, and the Sixth Circuit will necessarily have pendent jurisdiction over the arbitration agreement

decisions upon which the injunctions are based. Given that the Sixth Circuit has not yet addressed the asserted issues raised by Petitioners here, but is poised to do so, a writ of certiorari would be premature at this juncture.

In a footnote, Petitioners cite to two out-of-state cases where courts have purportedly interpreted powers of attorney differently from the interpretation given Kentucky powers of attorney by the lower court. These cases do not signify a split however. In *Myers v. GGNSC Holdings, LLC*, 2013 WL 1913557 (N.D. Miss. May 8, 2013), the U.S. District Court assumed, without the benefit of opposition from the party who might be expected to oppose arbitration, that a broadly-worded general power of attorney permitted the attorney in fact to execute an arbitration agreement on behalf of a principal. Notably, the federal court decided this issue only in the alternative, after concluding that a third party beneficiary theory would apply to bind the principal to a mandatory-for-services arbitration agreement. Furthermore, the federal court decided the issue by apparent application of Mississippi law on powers of attorney – not pursuant to any requirement of the FAA. Likewise, in *Estate of Smith v. Southland Suites of Ormond Beach, LLC*, 28 So.3d 103 (Fla. Dist. Ct. App. 2010) (per curiam), the Florida intermediate court decided the scope of the power of attorney at issue by application of Florida law, not pursuant to an application of a requirement from the FAA. Neither case represents a disagreement, much less a conflict, with the lower court here.

II. The Kentucky Supreme Court's Decision Does Not Implicate The FAA Or Trigger Federal Preemption.

Title 9 U.S.C. § 2 preserves intact contract defenses that pertain to the formation of an arbitration agreement. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 354-355 (2011) (Thomas, J., concurring) (reading 9 U.S.C. § 4 to explain the subset of contract defenses available under 9 U.S.C. § 2, and contrasting formation defenses, from those defenses that pertain to the revocation or enforceability of an agreement). Where a party's agent lacks authority to execute the arbitration agreement, no contract is ever formed. The FAA does not preempt the defense that no one with proper authority executed the arbitration agreement. Similarly, the FAA does not preempt a State judicial determination regarding the scope of an agent's authority.

There is a difference between a defense to the formation of a contract, the success at which triggers revocation of the contract, and no formation of a contract at all. The FAA does not trigger any substantive right pursuant to an agreement to arbitrate, independently of the existence of such an agreement. Therefore, the lower court's decision here does not trigger FAA analysis. There was no contract for arbitration.

The federal policy flowing from the agreement to arbitrate exists to place such agreements on the same footing as other contracts, *Granite Rock Co. v. International Broth. of Teamsters*, 561 U.S. 287, 302 (2010),

and any limitations upon contract defenses found in 9 U.S.C. § 2 are one aspect of this federal policy favoring arbitration. *Granite Rock Co.*, 561 U.S. at 302. However, whether an agreement to arbitrate ever existed (*i.e.*, whether there ever existed a meeting of the minds of the parties for an exchange of value) is a condition precedent before the rubrics of the FAA are triggered. *See id.* (policy considerations favoring arbitration flow from and are dependent upon an agreement to arbitrate); *see also Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 374 (1974) (obligations arising under the FAA exist by virtue of a party's contract for arbitration, and not by operation of law). The due regard for the federal policy favoring arbitration and the threat of federal preemption only arises upon presentation of a prima facie contract. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 475-476 (1989) (the due regard for the federal policy favoring arbitration applies to contract interpretation, and to questions of scope).

Ordinary State Contract law principles govern the formation of agreements to arbitrate. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (whether an agreement on arbitration was reached is a question answered by application of "ordinary state-law principles that govern the formation of contracts"). Whether a putative agreement to arbitrate exists is a question distinguishable from any dispute regarding the validity of formation, or enforceability of the contract. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546

U.S. 440, 444 n.1 (2006) (distinguishing the question of whether an arbitration agreement was "ever concluded," from the question of whether the agreement was void ab initio due to illegality).

As such, there is a two tier process in approaching an alleged arbitration agreement. Questions of whether a contract is fatally flawed, rendering it either void or unenforceable, are second tier queries. They are answered subject to application of the FAA.

However, the question of whether a prima facie agreement ever existed at all, *i.e.*, whether there occurred a meeting of the minds for an exchange of value, is a first tier question. It is answered prior to triggering the FAA. In *Buckeye Check Cashing*, this Court stated that a challenge "'upon such grounds as exist at law or in equity for the revocation of any contract'" refers to a challenge to the validity of the arbitration agreement, or to the validity of a larger contract in which an arbitration clause is ensconced. *Buckeye Check Cashing, Inc.*, 546 U.S. at 444. The Court went on to make a colorable distinction between a dispute regarding an arbitration agreement's validity, and one where there is a dispute as to whether an agreement was "ever concluded." *See Buckeye Check Cashing, Inc.*, 546 U.S. at 444 n.1.

Buckeye Check Cashing, Inc. recites a number of examples of such threshold disputes: Did the alleged obligor sign the contract? *Id.* (*citing Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992)). Did the signing obligor lack mental capacity to

assent? *Id.* (*citing Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003)). Did the signor ***lack authority to bind the obligor***? *Id.* (*citing Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000) and *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001)). Logically, before there is any calculus as to whether there exists "such grounds as exist at law or in equity for the revocation of any contract," *i.e.*, a challenge to the contract's validity and one subject to the FAA; there must be a prima facie case that the contract was in fact "ever concluded." Here, the lower court's decision operates to find that a contract was never concluded, and the FAA is thus not triggered.

> Consequently, the disputes before us are not about the ***enforcement*** of validly formed arbitration agreements covered by the KUAC [sic] and the FAA. Rather, the disputes are about the ***formation*** of the arbitration agreements; and specifically, whether the agent purporting to sign the arbitration agreement on behalf of his principal had the authority to do so.

Pet. App. 24 (emphasis in the original).

The decision below does not implicate the FAA. It involves solely a question of the State law on the scope of Agency authority, and this Court should therefore deny the petition for certiorari. *See Michigan v. Long*, 463 U.S. 1032, 1037-1044 (1983) (where the judgment of a State court rests on adequate and independent State grounds, the U.S. Supreme Court lacks jurisdiction to review the case, inasmuch as such a review

would only constitute an advisory opinion on federal law).

III. The Kentucky Supreme Court Interpreted The Powers Of Attorney In This Case According To Reasonable And Arbitration-Neutral Canons of Agency Interpretation.

The essential nature of the decision below subsists as an exercise in applying State Agency law and determining an Agency relationship. The Kentucky Supreme Court did not examine or interpret the arbitration agreements, neither as a whole nor in their terms, to arrive at that court's decision. If the Kentucky Supreme Court had found sufficient Agency, there is no reason to believe that that court would not have enforced the arbitration agreements. *See* Pet. App. 24; *see also Schnuerle v. Insight Communications Company, L.P.*, 376 S.W.3d 561 (Ky. 2012) (enforcing arbitration agreement in context of consumer internet service agreement); *Hathaway v. Eckerle*, 336 S.W.3d 83 (Ky. 2011) (enforcing arbitration agreement in context of automobile purchaser's dispute with auto dealership). Justice Noble's Dissent strongly suggests that at root the split in the lower court was not actually directed toward the reach of the FAA at all, but to the proper interpretation and construction of Kentucky powers of attorney. *See* Pet. App. 105-107.

A. The Kentucky Supreme Court Interpreted The Wellner Power Of Attorney Literally According To Its Language.

Notably, Petitioners' Question Presented does not properly pertain to the Wellner power of attorney or the lower court's interpretation thereof. That the Wellner instrument failed to include an express provision regarding arbitration is not the basis of the lower court's holding regarding the Wellner power of attorney. Rather, the lower court concluded that the black letter of the language in the Wellner power of attorney did not plausibly encompass the power to execute a pre-dispute arbitration agreement.

While the power granted to the Wellner agent to "institute legal proceedings" necessarily encompasses some discretion in exercising this power, it in no way implies that the agent had the authority to promise a third party to never exercise one of the powers actually granted, *e.g.*, the power to sue in a court of law. Fundamentally, the arbitration agreement was the pre-dispute waiver of one route of dispute resolution; it did not represent the institution of anything.

> Kindred acknowledges that this provision of the Wellner POA granting the power to "demand, sue for, collect, recover and receive all . . . demands whatsoever" and "to institute legal proceedings" did not expressly authorize Beverly to sign the pre-dispute arbitration agreement. Instead, Kindred argues that such authorization must be implied because arbitration is "reasonably necessary or

> incidental," as Kindred puts it, to "the ability to settle suits that have been brought pursuant to Joe's intended grant of authority." Kindred argues, "it would be an absurd result to recognize an agent's power to bring suit . . . and then deny that she has the power to settle those very claims." We do not disagree; but "arbitrating" is not "settling."

Pet. App. 35.

The Wellner power of attorney language regarding property contracts was likewise facially insufficient. A chose-in-action under Kentucky law is indeed personal property, but it would be at best unvested property in this circumstance. Moreover, a pre-dispute arbitration agreement is a contract fundamentally pertaining to a right. It is not the buying, selling, or leasing of any kind of property. No lay principal would understand it as a property transaction. Pet. App. 36-38. In sum, the interpretation of the Wellner power of attorney fell under its black letter, and Petitioners' Question Presented does not apply to it.

B. The Kentucky Supreme Court Interpreted The Clark Power Of Attorney According To The Revealed Intent Of The Principal, As Understood From The Standpoint Of The Reasonable Expectations Flowing From Language Used In Kentucky.

Here, the Kentucky Supreme Court held that the Clark power of attorney did not include the power to

execute the pre-dispute arbitration contract. It came to this conclusion by determining the intent manifested by the principal, given what that principal should reasonably see as flowing from the language used. *Cf. Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79-80 (1998) (arbitration requirement in collective bargaining agreement must be particularly clear).

Under Kentucky law, powers of attorney are strictly construed, *Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429 (Ky. 1924), giving effect only to the purposes of the principal. *See Clinton v. Hibbs' Executrix*, 259 S.W. 356, 357-358 (Ky. 1924) (agent's authority to conduct all business and execute all notes, at the agent's discretion, held not to encompass the power to bind the principal as surety). Under Kentucky law "[a]ctual authority arises from a direct, ***intentional*** granting of specific authority from a principal to an agent." *Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 830 (Ky. Ct. App. 2014) (*citing Mills Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky. Ct. App. 1990)) (emphasis added). The principal's discrimination against ***all*** powers of Agency is to be inferred by Kentucky courts, until those courts are satisfied that the inference has been overcome by the principal's communication. *See Mill Street Church of Christ v. Hogan*, 785 SW2d at 267 (burden to establish Agency is upon the proponent thereof). Given these arbitration-neutral principles, in determining whether a power of attorney authorizes a particular transaction, a construing Kentucky court of law must gauge whether the reasonable reading of the instrument signifies the

intent of the principal that such types of transaction be consummated on the principal's behalf.

The Kentucky Supreme Court's decision in this case, as in that of *Ping v. Beverly Enterprise* before it, took into account the reasoning from the RESTATEMENT (THIRD) OF AGENCY § 2.02 (comment h. (2006)). Notably, while the Restatement speaks to the significance of unforeseen consequences stemming from literally reading a broad power of attorney, it does not speak of these consequences as necessarily negative. For example, granting a security interest in a principal's property, *e.g.*, to secure a loan benefiting the principal, may be a common and desirable action taken by an attorney in fact. Nonetheless, it is a significant transaction potentially unforeseen by the principal, and must be set out explicitly in the power of attorney, according to the Common Law. *Cf. Clinton v. Hibbs' Executrix*, *supra* (agent empowered to conduct all business and execute all notes, at the agent's discretion, does not encompass the power to bind the principal as surety without language to this effect). Such a requirement of expression does not evince judicial hostility to securing transactions. Similarly, requiring explicit mention of the power to execute pre-dispute arbitration agreements does not signify judicial hostility toward arbitration.

Nonetheless, Petitioners contend that the lower court discriminated against arbitration, pointing to the following language:

> It would be strange, indeed, if we were to infer, for example, that an attorney-in-fact with the

> authority "to do and perform for me in my name all that I might if present to make any contracts or agreements that I might make if present" could enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude. It would, of course, be absurd to infer such audacious powers from a non-specific, general, even universal, grant of authority.

Pet. App. 42.

Petitioners claim, as does the Dissent below, that this list constitutes a "parade of horribles" into which the lower court lumped arbitration, inasmuch as each of these exemplars indicates an extreme, and arguably distasteful, transaction taken on behalf of a principal. Petitioners and the Dissent misconstrue the purpose of the listing however.

The lower court used this hyperbolic list to prove a point, not to make a comparison. The point is that, even though all of these transactions are literally covered by language giving the agent the right to step in the shoes of the principal, no court is going to nonchalantly assume that the agent was granted the authority to put the principal's child up for adoption, without specifically-tailored language in the power of attorney to that effect.

That is, a principal certainly could put a child up for adoption in person. This may be viewed as an unfortunate transaction, but the fact that such a transaction is consummated by an agent does not make the transaction itself any better or worse in character. It does make the transaction fatally suspect however, if the agent held only a general, albeit broad catch-all, power of attorney. That the Kentucky Supreme Court reads limitations into even the most general and universal of powers of attorney is a practice that preceded that court's line of arbitration cases. *See* Pet. App. 43-44 (lower court *citing Rice v. Floyd*, 768 S.W.2d 57, 59 (Ky. 1989) for this proposition).[4] Despite a grant of compete proxy power, the Kentucky Supreme Court is still going to recognize a back-stop of what can be reasonably inferred from a universal but non-specific grant of authority.

Petitioners claim, as does the Dissent below, that the lower court's allusion to the Kentucky Constitution signifies an elevation of the right to civil trial to a sacrosanct status.

> [T]he right of trial by jury, . . . incidentally is the only thing that our Constitution commands us to "hold sacred." See Ky. Const. § 7 ("The ancient mode of trial by jury shall be

---

[4] In *Rice v. Floyd*, the Kentucky Supreme Court announced that even the broadest power of attorney would not have all the authority that a guardian might have. *Rice v. Floyd*, 768 S.W.2d at 59 ("The scope of authority, duties and accountability of a guardian is much broader than that of a traditional power of attorney, even one intended to survive disability.").

> held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.").

Pet. App. 41.

Petitioners and the Dissent claim that, by virtue of this purported elevation in status, the Kentucky Supreme Court required specific Agency power to waive a principal's trial rights via the pre-dispute arbitration agreement. Not so. The lower court made clear that it was not purposing to craft an Agency rule to protect trial rights per se; rather, the lower court held that it deemed the Kentucky Constitution to inform principals as to what is reasonably foreseeable in Kentucky instruments, thereby providing a key to determining the meaning expressed in a power of attorney.

> [I]t would be absurd ***to infer*** from a non-specific, universal grant, the principal's ***assent*** to surrender of other fundamental, even sacred, liberties.

Pet. App. 42 (emphasis altered).

That the Kentucky Supreme Court chose to deem the Kentucky principal to be informed by the State Constitution's characterizations – as opposed to being informed by ubiquitous arbitration clauses in the fine print of consumer contracts which consumers do not have a hand in drafting and often never notice – does not constitute an incident of discrimination against arbitration.[5] The Kentucky Supreme Court's holding

---

[5] Interestingly, the Wellner and Clark arbitration agreements are facially governed by the Kentucky Uniform Arbitration Act.

explicitly affirms that pre-dispute nursing home arbitration agreements are enforceable, and can be executed by properly empowered agents. In sum, this Court should not review this case because it involves solely a reasonable interpretation of a Kentucky power of attorney, and does not burden the execution of arbitration agreements.

IV. The Decision Below Is Consistent With This Court's Precedent.

Petitioners rely upon *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), to argue that State law contract defenses are preempted by the FAA in the event that the defenses "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 333 (*citing Doctor's Associates, Inc. v. Casarotto, see infra*). *Concepcion* stands for the proposition that even arbitration-neutral State Contract law is preempted if it has the effect of undermining the efficacy of entering into arbitration agreements. In *Concepcion*, an arbitration clause in a consumer contract in California included a class action waiver. Yet, California law prohibited just such waivers in the context of consumer

---

Pet. App. 24. However, because of a jurisdictional anomaly in the agreements potentially interfering with the KUAA's application, the FAA was held to govern the agreements. *See* Pet. App. 63. Petitioners' position must implicitly be then that a Kentucky power of attorney could mean one thing in a FAA context (applying federal preemption), and another in an intra-State KUAA context (no federal preemption). Such a result is self-evidently problematic. A grant of Agency should be interpreted uniformly and objectively, faithful to the mandate of the principal.

contracts of adhesion, and, as such, the U.S. Court of Appeals for the Ninth Circuit found the arbitration clause unconscionable and unenforceable under California law (following the California Supreme Court's holding enunciated in *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005)). The Ninth Circuit reasoned that the California rule against class action waivers did not single out arbitration contracts as such for disparate treatment, as the rule applied equally to contracts barring class action in the context of in-court litigation.

This Court reversed, holding that even such a facially neutral State law rule, given that it would have a disproportionate impact on arbitration, is preempted by the FAA. The FAA encourages the use of arbitration for dispute resolution, and the benefit of arbitration for the parties in consumer transactions is the relative speed, cost, and efficiency of arbitration. Class actions negate much of the advantages in speed, cost, and efficiency. Thus, because the benefits of arbitration would be absent without a class action waiver, California's refusal to enforce class action waivers had the effect of removing an entire class of dispute from the ambit of arbitration. That rule was preempted.

Concepcion is distinguishable from the circumstance here. First and most obviously, *Concepcion* is not a case involving the ***formation*** of an arbitration contract. There was no question that an agreement had been reached in *Concepcion*, and it was an agreement that included a class action waiver. As the Concurring Opinion in *Concepcion* pointed out:

> Reading §§ 2 and 4 [from the FAA] harmoniously, the "grounds . . . for the revocation" preserved in § 2 would mean grounds related to the making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake.

AT&T Mobility LLC v. Concepcion, 563 U.S. at 355 (Thomas, J., concurring). "Under this reading, the question here would be whether California's *Discover Bank* rule relates to the making of an agreement. I think it does not." *Id.* at 356. Here, the issue is unequivocally related to "the making of an agreement." *Concepcion* thus is distinguishable.

Additionally, *Concepcion*'s concern for a disproportionate impact was directed at a State rule that negated the advantages of arbitration, making arbitration effectively worthless as an alternative to litigation. This is not the effect of the lower court's decision here. No advantage of the arbitral method is affected.

Finally, the practical effect of the *Discover Bank* rule in California was to render many agreements to arbitrate unenforceable, even though both parties had agreed to arbitration. In contrast, in the case below, the Kentucky Supreme Court made clear that a sufficient grant of authority to enter into such an agreement would yield a valid contract. The holding of *Concepcion* simply has no application to the lower court's decision.

Petitioners also cite to *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996), for support. In that case, this Court was faced with a Montana statute mandating that arbitration clauses in contracts had to be conspicuous and in a different font than the rest of the contract. This Court held that such a highlighting of the arbitration clause impermissibly ostracizes this clause from all the other clauses in the contract, and is preempted by the FAA.

Petitioners' citation to *Casarotto* overlooks key differences between the cases: The Montana statute placed an encumbrance upon arbitration agreements themselves. Here there is no requirement placed on the agreements; the lower court's decision only affects entirely separate, independent instruments of Agency. The Montana statute required that the subject matter be highlighted, thereby ostracizing it as different than other types of provisions in a contract. Here, the only requirement is that the subject matter simply appear in the instrument of Agency authority, which in no way implies that an agreement to arbitrate is a suspect transaction. *Casarotto* is thus distinguishable.

The case of *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012), is even more clearly inapplicable to this case. In *Marmet* this Court reversed a West Virginia Supreme Court decision which held that the FAA did not apply, at all, to personal injury or wrongful death claims and that arbitration agreements pertaining to those claims would not be enforced. The West Virginia Supreme Court came to this conclusion based upon its own esoteric reading of the

statutory history of the FAA. The Kentucky Supreme Court did not, nor did it have any reason to, analyze the statutory history of the FAA, nor did the Kentucky Supreme Court exclude any class of dispute from being subject to pre-dispute arbitration agreements. *Marmet* has no application.

Petitioners ask that the lower court's decision be vacated and remanded for further consideration in light of *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2016). However, the Kentucky Supreme Court has already considered the impact of *DIRECTV* in this case. Subsequent to the lower court's decision, Petitioner below filed a motion for rehearing. Petitioners filed a motion to supplement the authority for rehearing, to add and cite to *DIRECTV*. (App., *infra*, 1a-6a) Petitioners included argument as to *DIRECTV*'s applicability to this case in their motion to supplement. The Kentucky Supreme Court granted the motion to supplement prior to ruling on the motion for rehearing (App., *infra*, 7a), and therefore has already taken *DIRECTV* into account.

Additionally, *DIRECTV* is facially distinguishable from the circumstances presented in the lower court's decision. In *DIRECTV v. Imburgia*, the defendant media corporation provided a form contract to its California consumers, one that included an arbitration clause excluding class action arbitration. The clause was conditioned on the availability, *i.e.*, the continued viability, of the class action waiver. If local law refused to enforce the class action waiver, then the arbitration clause itself would be rendered unenforceable, per the terms of

the contract. Post-*AT&T v. Concepcion*, the condition for revoking the arbitration clause could only be triggered if the lower court imported obsolete law (California's *Discover Bank* rule) into the contract. This the California appellate court did, holding that the arbitration clause was unenforceable because the law at the time of the contract's inception prohibited the class action waiver.

Given that the evinced intent of the contracting *DIRECTV* parties was to enter into an arbitration agreement, and given that their evinced intent was also to exclude class action arbitration; normal contract construction would have been to opt for the importation of valid law to effect the contract. This Court thus recognized that the California appellate court had deliberately misapplied California Contract law, out of apparent animus against arbitration. This Court reversed and remanded to the lower California court.

Contract law favors the enforcement of contracts made. There is no such analogous preference in the interpretation of Agency. Agency determinations are an unbiased endeavor to determine the intent of the principal, without regard to the promotion of a particular, publicly-favored transaction. *DIRECTV*, along with the other cases cited in the petition, have no application to the lower court's decision, and the lower court's decision is fully consistent with this Court's binding precedents.

V. That This Case Comes Out Of The Kentucky Supreme Court, Rather Than The U.S. Court Of Appeals For The Sixth Circuit, Makes This Case A Poor Vehicle For Review Of The Requirements Of The FAA.

Petitioners claim that the FAA can preempt State law regarding the interpretation of powers of attorney. Even if this claim is true, this case constitutes a poor vehicle to dispose of this issue.

The fact that this Court is not unanimous on whether the FAA should apply in State court means that a factor outside of Petitioners' claim may be decisive in the result. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court concluded that section 2 of the FAA applies equally in State court actions, and thus preempts State courts from applying inconsistent standards, over the dissent of Justice O'Connor, joined by Justice Rehnquist. *See id.* at 21. Justice O'Connor eventually accepted the stare decisis effect of *Keating* in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 283-284 (1995) (O'Connor, J., concurring), even while "continu[ing] to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass." *Id.* at 283. But in *Allied-Bruce*, two more Justices took up the view "that *Southland* clearly misconstrued the Federal Arbitration Act," *id.* at 284 (Scalia, J., dissenting), and that the FAA is "wholly inapplicable in [State] courts." *Id.* at 297 (Thomas, J., dissenting).

In *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015), Justice Thomas made clear that he "remain[s] of the view that the Federal Arbitration Act . . . does not apply to proceedings in state courts" and "does not require state courts to order arbitration." *Id.* at 471 (Thomas, J., dissenting). The continuing disagreement on the Court over this question makes a case coming from a State court a poor candidate for resolving any issue involving the substance of the FAA. This is so because such issues have often closely divided the Court. *See, e.g., American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). *Concepcion* was decided by a five justice majority. The origin of this case in the State court system makes it a very poor candidate for review.

VI. Interpreting State Agency Law In Deference To A Federal Statutory Scheme Would Have Unforeseen Negative Ramifications.

Determination of the intent of a principal in Agency is necessarily a task committed to the judiciary.[6] At the end of the day, some court is going to have the final say as to what Joe Wellner and Oliver Clark

---

[6] It is interesting to note however, the Louisiana Civil Code, La. Civ. Code art. 2997, provides that an express power in a power of attorney (called a "mandate" in Louisiana law) is required for the agent to have the authority to refer a matter to arbitration on behalf of the principal. Presumably Petitioners would take the position that this Louisiana statute would be preempted as well.

meant in their respective powers of attorney. That court should be the court of last resort in Kentucky. This Court should not wish to take on a role in interpreting Agency relationships in the United States. Issuing a writ of certiorari in this case would open up this Court's doors to parties seeking alternative interpretations of powers of attorney whenever a federal statutory scheme can be implicated and whenever those parties are dissatisfied with a State court interpretation.[7] This petition threatens to federalize a huge area of State law.

Finally, "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. at 664 (quoting *Volt v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. at 479). This precept is precisely what the lower court's decision safeguards. Because the Kentucky Supreme Court could not establish with certainty the principals' intent to grant their agents the power to execute these agreements, that court narrowly construed the documents, as that Court was required to do under Kentucky law.

Normally a party presented a power of attorney to establish an agent's authority over another party's

---

[7] Moreover, upon issuing a writ in this case, this Court may henceforth be called upon to determine other questions related to arbitration agreements, *e.g.*, whether, in light of the public policy favoring arbitration, a principal had sufficient capacity to enter into the agreement.

business prefers ***more*** explicit language in the power of attorney rather than ***less***. . . . For instance, in applying for a mortgage, banks typically require a very specific and detailed power of attorney before the bank will act on an application via attorney in fact. As such, the preference of Petitioners and Amici for less explicit language speaks to their eagerness for nursing home residents to enter into these, practically unbreakable, arbitration agreements at all costs . . . perhaps inadvertently. Amici apparently justify this result as an outcome expedient for the financial well being of the nursing home industry. However, this would be a wholly illegitimate means to that end. While the FAA sets forth a national policy of favoring arbitration, presumably its aim is not to facilitate mistaken transactions. Any other conclusion would have due process implications, potentially converting the routine interpretation of a power of attorney by a State court into a Constitutional case.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Kentucky should be denied.

Respectfully submitted,

ROBERT E. SALYER
Counsel of Record
WILKES & MCHUGH, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com

JAMES T. GILBERT
COY, GILBERT, SHEPHERD & WILSON
212 North Second Street
Richmond, KY 40475
(859) 623-3877

Counsel for Respondents

SEPTEMBER 2016

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION — MOVANTS/PETITIONERS

v.

ON REVIEW FROM
COURT OF APPEALS
CASE NO: 2012-CA-002212-I

BEVERLY WELLNER, Individually and on behalf of the Estate of JOE P. WELLNER, deceased, and on behalf of the wrongful death beneficiaries of JOE P. WELLNER — RESPONDENT/RESPONDENT

MOVANTS' MOTION FOR LEAVE TO CITE SUPPLEMENTAL AUTHORITY

Movants/Petitioners, Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; and Kindred Healthcare Operating, Inc. and Kindred Rehab Services, Inc. d/b/a Peoplefirst

Rehabilitation, respectfully move for leave to cite supplemental authority, specifically the recent United States Supreme Court Opinion, rendered December 14, 2015, for consideration by this Court in the Petition for Rehearing:

DIRECTV, Inc. v. Imburgia, ___ U.S. ___, ___ S. Ct. ___ (2015), 2015 WL 8546242 (Dec. 14, 2015) (copy attached).

DIRECTV involved the California Court of Appeal's refusal to enforce an arbitration agreement pursuant to its interpretation of state law. The California Court phrased the issue as, "Does the law of California make the contract's class-arbitration waiver unenforceable?" *DIRECTV*, 2015 WL 8546242 at *3. California law previously held that class-arbitration waivers in consumer contracts were unenforceable as unconscionable. *Id.* at *3. However, in 2011, the U.S. Supreme Court held that same California rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in the Federal Arbitration Act. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). Regardless, the California court in *DIRECTV* concluded *Concepcion* did not change the result, that class-arbitration waivers are still unenforceable "under California law." *DIRECTV*, 2015 WL 8546242 at *3. Thus, the Court of Appeal refused to enforce the arbitration contract. *Id.*

The *DIRECTV* Court reversed, stating:

> Lower court judges are certainly free to note their disagreement with a decision of this

> Court. But the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. [Citations omitted]. The Federal Arbitration Act is the law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it. U.S. Const., Art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States").

DIRECTV, 2015 WL 8546242 at *5.

The *DIRECTV* Court summarized its focus, "we must decide not whether . . . [the state court's] decision is a correct statement of California law **but whether (assuming it is) that state law is consistent with the Federal Arbitration Act.**" *Id.* at *5 (emphasis added). Recognizing that state courts are "the ultimate authority on that [state] law," (*id.* at *5), the *DIRECTV* Court nevertheless explained its duty to "decide whether the decision of the California court places arbitration contracts 'on equal footing with all other contracts.'" *Id.* at *6 (*citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)):

> And in doing so, **we must examine whether the Court of Appeal's decision in fact rests upon "grounds as exist at law or in equity for the revocation of any contract."** 9 U.S.C. § 2. That is to say, we look not to grounds that the California court might

> have offered but rather to those it did in fact offer.

DIRECTV, 2015 WL 8546242 at *6 (emphasis added).

The California court's interpretation of the arbitration contract was "unique, restricted to that [arbitration] field." *Id.* at * 6. *DIRECTV* cautioned state courts against such holdings that apply or interpret state law specific to arbitration contracts:

> Third, nothing in the Court of Appeal's reasoning suggests that a California court would reach the same interpretation of "law of your state" **in any context other than arbitration**. . . . Even given our assumption that the Court of Appeal's conclusion is correct, **its conclusion appears to reflect the subject matter at issue here (arbitration), rather than a general principle that would apply to contracts** using similar language but involving state statutes invalidated by other federal law.
>
> Fourth, **the language used by the Court of Appeal focused only on arbitration.**

See DIRECTV, 2015 WL 8546242 at *6-*7 (emphasis added).

DIRECTV's reasoning may be instructive in this Petition for Rehearing. This Court evaluated the powers granted by the Clark, Whisman and Wellner POAs, specifically evaluating whether those POAs granted authority sufficient for *an arbitration contract* – which

this Court differentiated from all other contracts[1], as containing an additional "waiver of a fundamental constitutional right" to jury trial:

> Our focus has been, and remains, upon the scope of the powers expressed in the power-of-attorney document, and whether those expressed powers are sufficient to supply the principal's assent **needed to form an agreement, which on its face, forfeits those fundamental constitutional rights**.

Id. at * 15 (emphasis added).

This Court focused on whether powers expressly granted by a POA document provided sufficient authority *specifically in the context of enforcing an arbitration contract.* Even after finding the Clark POA granted sufficient authority to sign a contract, (*see id.* at * 14), the Court narrowly focused on the underlying contract's *arbitral nature*: "we also consider the extent to which the authority of an agent to waive his principal's fundamental constitutional rights to access the courts, to trial by jury, and to appeal to a higher court, can be inferred from a less-than-explicit grant of authority"). *Id.* at * 15. *DIRECTV* holds this reasoning is preempted by the FAA. *See DIRECTV*, 2015 WL 8546242 at *8.

---

[1] "Infusing the authority to enter into 'any contract or agreement' with the authority to waive fundamental constitutional rights eviscerates our long line of carefully crafted jurisprudence dictating that the principal's explicit grant of authority delineated in the power-of-attorney document is the controlling factor in assessing the scope of the powers of the attorney-in-fact." 2015 WL 5634309 at *16.

Because the California court's holding did not place arbitration contracts "on equal footing with all other contracts," . . . and did not "give due regard . . . to the federal policy favoring arbitration," (citations omitted), the Supreme Court held that the FAA preempted the Court of Appeal's decision and ruled that the state court must enforce the arbitration agreement. *See DIRECTV*, 2015 WL 8546242 at *8 (*citing Perry v. Thomas*, 482 U.S. 483, 493, n. 9 (1987) (noting that the FAA preempts decisions that take their "meaning precisely from the fact that a contract to arbitrate is at issue").

The analysis employed by the U.S. Supreme Court in *DIRECTV* applies to this case and may be instructive to this Court in ruling on the Petition for Rehearing. Movants cite *DIRECTV* for this reason.

A copy of the opinion is attached for the Court's ready reference.

Respectfully submitted,

QUINTAIROS, PRIETO,
WOOD & BOYER, P.A.

/s/ Kristin M. Lomond
Donald L. Miller, II, Esq.
J. Peter Cassidy, III, Esq.
Kristin M. Lomond, Esq.
9300 Shelbyville Road, Suite 400
Louisville, Kentucky 40222
Telephone: (502) 423-6390
Facsimile: (502) 423-6391

Counsel for Movants,
Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; and Kindred Healthcare Operating, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that ten (10) copies of this brief were served upon Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Rm. 209, State Capitol, 700 Capitol Ave., Frankfort, KY 40601-3488, and one (1) copy served on Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Jean Chenault Logue, Circuit Judge, Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; Robert Salyer and Richard E. Circeo, Esq., Wilkes & McHugh, P.A., 429 N. Broadway, P.O. Box 1747, Lexington, KY 40588-1747, and J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 40475 on this 15th day of December, 2015.

/s/ Kristin M. Lomond
Counsel for Movants

[Copy Of Opinion Omitted]

[SEAL]

SUSAN STOKLEY CLARY
Clerk

OFFICE OF THE CLERK
SUPREME COURT
OF KENTUCKY
ROOM 209,
STATE CAPITOL
700 CAPITAL AVE.
FRANKFORT,
KENTUCKY
40601-3488

Telephone:
(502) 564-4720
FAX:
(502) 564-5491

RECEIPT NOTICE

TO: DONALD LEE MILLER II

FROM: SUSAN STOKLEY CLARY, CLERK

DATE: 12/16/2015

FILE NUMBER: 2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERHSHIP, D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A — APPELLANTS

V.

BEVERLY WELLNER, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF JOE P. WELLNER, DECEASED, AND ON BEHALF OF THE WRONGFUL — APPELLEES

THE DOCUMENT LISTED BELOW HAS BEEN RECEIVED AND FILED IN THIS OFFICE TODAY IN THE ABOVE CASE:

MOVANTS FILED MOTION FOR LEAVE TO CITE SUPPEMENTAL AUTHORITY.

CC:

JAMES T. GILBERT	KRISTIN M. LOMOND
JAMES PETER CASSIDY III	RICHARD ERIC CIRCEO
ROBERT EARL SALYER	
FILE COPY	

Supreme Court of Kentucky

2013-SC-000430-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, ETC., ET AL. — MOVANTS

COURT OF APPEALS NO. 2012-CA-002113
CLARK CIRCUIT COURT NO. 10-CI-00469

JANIS E. CLARK, ETC. — RESPONDENT

AND

2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, ETC., ET AL. — MOVANTS

COURT OF APPEALS NO. 2012-CA-002112
CLARK CIRCUIT COURT NO. 10-CI-00472

BEVERLY WELLNER, ETC. — RESPONDENT

ORDER

Movant's motion for leave to cite supplemental authority, in above-styled actions, is granted and the heretofore tendered supplemental authority is filed.

ENTERED: December 30, 2015.

/s/ John Minton
Chief Justice

FILED
SEP 20 2016
OFFICE OF THE CLERK

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONERS

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Respondents' Asserted Obstacles To Review Are Flimsy 2

A. The Lack Of A Conflict With The Sixth Circuit Is No Reason To Deny Review 2

B. The Case's Origins In State Court Are No Bar To Review. 5

C. Granting Review Here Will Not "Federalize" State Contract Law 5

II. The Decision Below Conflicts With The FAA And This Court's Decisions Interpreting The Statute 6

A. The FAA Preempts The Express-Authorization Rule Announced Below. 6

B. The FAA Fully Applies Here. 9

III. Summary Relief Is Appropriate. 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Bruce Terminix Cos. v. *Dobson*,
513 U.S. 265 (1995) 5

AT&T Mobility LLC v. *Concepcion*,
563 U.S. 333 (2011) 1, 6, 9

Buckeye Check Cashing, Inc. v. *Cardegna*,
546 U.S. 440 (2006) 5, 7, 9, 10

Citizens Bank v. *Alafabco, Inc.*,
539 U.S. 52 (2003) (per curiam) 2, 5

Clinton v. *Hibbs' Executrix*,
259 S.W. 356 (Ky. 1924) 8

DIRECTV, Inc. v. *Imburgia*,
136 S. Ct. 463 (2015) ..... *passim*

Doctor's Assocs., Inc. v. *Casarotto*,
517 U.S. 681 (1996) 1, 5, 6, 9

Estate of Smith v. *Southland Suites of Ormond Beach, LLC*,
28 So. 3d 103 (Fla. Dist. Ct. App. 2010)
(per curiam) 3

First Options of Chicago, Inc. v. *Kaplan*,
514 U.S. 938 (1995) 10

GGNSC Stanford, LLC v. *Gilliam*,
2016 WL 4700135
(E.D. Ky. Sept. 7, 2016) 3

KPMG LLP v. *Cocchi*,
132 S. Ct. 23 (2011) (per curiam) 2, 5

TABLE OF AUTHORITIES—continued

Page(s)

Marmet Health Care Ctr., Inc. v. *Brown*,
132 S. Ct. 1201 (2012) (per curiam) 2, 5, 9

Myers v. *GGNSC Holdings, LLC*,
2013 WL 1913557
(N.D. Miss. May 8, 2013) 3

Nitro-Lift Techs., L.L.C. v. *Howard*,
133 S. Ct. 500 (2012) (per curiam) 2, 5

Perry v. *Thomas*,
482 U.S. 483 (1987) 1, 5, 6

Preston v. *Ferrer*,
552 U.S. 346 (2008) 5

Ritz-Carlton Dev. Co. v. *Narayan*,
136 S. Ct. 800 (2016) 5

Schumacher Homes of Circleville, Inc. v.
Spencer,
136 S. Ct. 1157 (2016) 5

Southland Corp. v. *Keating*,
465 U.S. 1 (1984) 5

Statutes, Rules and Regulations

9 U.S.C. § 2 9

REPLY BRIEF FOR PETITIONERS[1]

The brief in opposition offers little in defense of the merits of the decision below. Respondents instead largely parrot the pronouncement by the Kentucky Supreme Court majority that its holding does not discriminate against arbitration agreements. But that characterization cannot be squared with what the Kentucky court actually did. The decision below holds that a power-of-attorney document that conveys the authority to enter into contracts is effective as to all contracts *except* arbitration agreements—for which an additional explicit reference to arbitration is required.

As the petition explains, that differential treatment of arbitration runs headlong into this Court's repeated instruction that the FAA "preclude[s] States from singling out arbitration provisions for suspect status." *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see also *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-69 (2015); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). And just as in *Imburgia*, this Court's intervention is needed to correct the lower court's defiance of the FAA under the guise of state contract law.

Respondents' other arguments against review fare no better. They contend that the FAA does not apply because the rule announced below is nominally one of contract formation—but a similar argument was raised, and rejected, in *Imburgia*. They suggest that the Court should await a decision on the issue by the Sixth Circuit—but doing so is neither neces-

[1] The Rule 29.6 Statement in the Petition remains accurate.

sary nor advisable. And they argue that this case is a poor vehicle because it comes from a state court—ignoring the fact that many of this Court's FAA cases have arisen in precisely that setting.

In short, the conflict between the decision below and this Court's FAA precedents is clear, and respondents have not articulated any persuasive reason why this Court should decline to review the important, and clearly erroneous, ruling by the Kentucky court concerning the proper interpretation of the FAA in the context of cases like this one.

I. Respondents' Asserted Obstacles To Review Are Flimsy.

Respondents make a variety of arguments for why they believe this case is unsuitable for review. But each of those arguments is demonstrably incorrect.

A. The Lack Of A Conflict With The Sixth Circuit Is No Reason To Deny Review.

First, respondents argue that review should be denied because there is no conflict between the decision below and the decisions of other courts. Opp. 12-13. But this Court has repeatedly corrected state courts' failure to apply the FAA properly—notwithstanding the absence of an appellate court conflict—when the state court's ruling is clearly wrong and threatens significant adverse consequences. *E.g.*, *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam); *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201 (2012) (per curiam); *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23 (2011) (per curiam); *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam). The Court's intervention

here is justified on those same grounds. See Pet. 20-23.

Indeed, as the petition demonstrates (at 18-19), the decision below conflicts with the decisions of every Kentucky federal court to rule on the issue, creating an outcome-determinative split between the state and federal courts in Kentucky. The enforceability of an arbitration agreement signed by an agent in Kentucky therefore turns entirely on whether a party seeks to enforce the agreement in state or federal court.

Since the petition was filed, that conflict has only become further entrenched: a judge on the Eastern District of Kentucky has joined the impressive array of Western District judges in rejecting the decision below, explaining: "The Court agrees * * * that *Whisman* is preempted by the FAA. * * * Without question, the Kentucky Supreme Court has singled out arbitration agreements by requiring that a [power of attorney] expressly include an agent's authority to enter into a pre-dispute arbitration agreement, as opposed to other types of contracts." *GGNSC Stanford, LLC* v. *Gilliam*, 2016 WL 4700135, at *6, 7 (E.D. Ky. Sept. 7, 2016).[2]

---

[2] *Whisman* also conflicts with the decisions of courts in at least two other States. See Pet. 19 n.6 (citing *Myers* v. *GGNSC Holdings, LLC*, 2013 WL 1913557 (N.D. Miss. May 8, 2013), and *Estate of Smith* v. *Southland Suites of Ormond Beach, LLC*, 28 So. 3d 103 (Fla. Dist. Ct. App. 2010) (per curiam)). Respondents attempt to minimize this conflict as a mere disagreement regarding state law (Opp. 13), but that misses the point entirely. Petitioner cited these cases not to establish any proposition about the FAA, but rather as further confirmation that the Kentucky Supreme Court's rule is "unique" and "restricted to [the] field" of arbitration (*Imburgia*, 136 S. Ct. at 469) because it is so at

Respondents suggest that this split may resolve itself and argue that this Court should stay its hand until the Sixth Circuit weighs in on the issue. Opp. 12-13. As a practical matter, however, the issue may not be presented to this Court in another case.

Consistent with this Court's precedents, the Sixth Circuit is likely to affirm the Kentucky district courts' holdings that *Whisman* is preempted by the FAA. The prevailing defendants in those cases would therefore be unable to seek certiorari. And the plaintiffs in those cases would likely not seek certiorari for strategic reasons, choosing instead to find ways to file future cases in state courts.[3]

There accordingly is no reason to wait for the Sixth Circuit to weigh in—especially given that, as several *amici* explain, the decision below already "throws into doubt the enforceability of countless arbitration agreements" between care facilities and their residents, sowing "legal uncertainty" that benefits no one. Br. of Am. Health Care Ass'n et al. 6 ,7.

---

odds with the ordinary interpretation of powers of attorney and therefore impermissibly singles out arbitration agreements for disfavored treatment.

[3] Moreover, no new case presenting this issue is likely to reach this Court from Kentucky state courts. Parties are highly unlikely to invoke arbitration under similar circumstances in Kentucky courts, suffering losses at every level of the state court system, solely for the opportunity to seek this Court's review. Certainly, those parties are most unlikely to litigate such cases on the merits simply to preserve the arbitration issue—the cases are far more likely to settle, precluding any further review of the arbitration question.

B. The Case's Origins In State Court Are No Bar To Review.

Next, respondents argue that this case is a "poor vehicle to dispose of this issue" because it arises out of a state court. Opp. 32. Yet that has never been an obstacle to this Court's review. To the contrary, because "[s]tate courts rather than federal courts are more frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs.*, 133 S. Ct. at 501.

Respondents also suggest that Justice Thomas's view that the FAA does not apply to state-court proceedings complicates the resolution of this case (Opp. 33), but that view has never limited this Court's exercise of its authority to ensure that state courts properly apply the Court's settled FAA precedents. Indeed, the Court has regularly taken summary action in and undertaken plenary review of state-court decisions applying the FAA. See *Schumacher Homes of Circleville, Inc.* v. *Spencer*, 136 S. Ct. 1157 (2016); *Ritz-Carlton Dev. Co.* v. *Narayan*, 136 S. Ct. 800 (2016); *Imburgia*, 136 S. Ct. 463; *Nitro-Lift Techs.*, 133 S. Ct. 500; *Marmet*, 132 S. Ct. 1201; *Cocchi*, 132 S. Ct. 23; *Preston* v. *Ferrer*, 552 U.S. 346 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006); *Citizens Bank*, 539 U.S. 52; *Casarotto*, 517 U.S. 681; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995); *Perry*, 482 U.S. 483; *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984).

C. Granting Review Here Will Not "Federalize" State Contract Law.

Finally, respondents argue that granting review and reversing here would "federalize a huge area of

State law." Opp. 34. But this Court rejected a similar argument in *Imburgia*, where the respondents argued in their brief in opposition that review should be denied because the California court had decided the case on state-law grounds. See Br. in Opp. to Pet. for Writ of Cert. at 3, *Imburgia* (No. 14-462), 2015 WL 455815, at *3.

This case, like *Imburgia*, simply calls for an application of the same fundamental "equal footing" principle that this Court has applied in numerous other FAA cases to prohibit States from treating arbitration agreements differently from other contracts. See *Casarotto*, 517 U.S. at 687 (noting that the FAA "preclude[s] States from singling out arbitration provisions for suspect status"); see also, *e.g.*, *Concepcion*, 563 U.S. at 339; *Perry*, 482 U.S. at 492 n.9.

II. The Decision Below Conflicts With The FAA And This Court's Decisions Interpreting The Statute.

A. The FAA Preempts The Express-Authorization Rule Announced Below.

Respondents' defense of the merits of the decision below is cursory. They essentially ignore the principal dissenting opinion—joined by three of the lower court's seven Justices—which explained in detail why the majority had impermissibly discriminated against arbitration agreements. Respondents take at face value the majority's assertions that the decision below is neutral toward arbitration.

But this Court rejected a similarly credulous approach in *Imburgia*, where the respondents attempted to rely on the California Court of Appeal's purportedly neutral interpretation of the phrase "law of

your state" in a consumer contract. *Imburgia* held that although "California courts are the ultimate authority on [California] law," it was for this Court to "decide whether the decision of the California court places arbitration contracts "'on equal footing with all other contracts.'" *Imburgia*, 136 S. Ct. at 468 (quoting *Buckeye*, 546 U.S. at 443). In other words, the Court must determine whether a state court would in fact "interpret contracts other than arbitration contracts the same way," rather than simply accepting the state court's professions of neutrality. *Id.* at 469.

Here, it is clear that the express-authorization rule is *not* neutral, but rather is "unique" to arbitration and hence invalid. *Ibid.* The Kentucky Supreme Court did not hold, as respondents suggest, that *any* "significant transaction potentially unforeseen by the principal * * * must be set out explicitly in the power of attorney." Opp. 22. Rather, it held that even when the agent has been given the express authority *to contract*—as the attorney-in-fact in the *Clark* case below had—a further express reference to arbitration in the power of attorney is needed before the attorney-in-fact can agree to arbitration. As the dissenting Justices below observed, that rule clearly "singles out arbitration agreements for disfavored treatment" and hence is preempted. Pet. App. 78a (Abramson, J., dissenting).[4]

---

[4] The only case respondents cite to support a purported general rule of Kentucky law that any "significant transaction" must be expressly mentioned in a power of attorney is *Clinton* v. *Hibbs' Executrix*, 259 S.W. 356 (Ky. 1924). See Opp. 21-22. And that case does not stand for any such rule. In *Clinton*, the court held that a wife lacked authority to sign her husband's name as a surety because her power of attorney expressly *limited* her au-

Respondents argue that at minimum, the decision below should be upheld as to the *Wellner* case because the decision there did not turn on the "fail[ure] to include an express provision regarding arbitration." Opp. 19. But the Kentucky court effectively required an express mention of arbitration when it held that the *Wellner* power of attorney—which authorized the agent to make contracts "of every nature in relation to both real and personal property" (Pet. App. 22a)—did not encompass the making of arbitration agreements. This reasoning clearly disfavors arbitration agreements in violation of the FAA: It is unthinkable that Kentucky courts would interpret the phrase "contracts * * * in relation to * * * personal property" to exclude any other kind of agreement relating to an individual's legal claims, given that Kentucky law recognizes causes of action as "personal property." See Pet. App. 85a (Abramson, J., dissenting). In short, the decision below impermissibly discriminated against arbitration in its treatment of both the *Clark* and *Wellner* powers of attorney.

Finally, respondents attempt in vain to distinguish away this Court's FAA precedents—including *Concepcion*, *Casarotto*, and *Marmet*—by arguing that they should be limited to their precise facts. Opp. 26-30. But the principles established by those cases are not so factbound. On the contrary, the spectrum of factual scenarios presented in those cases itself

---

thority to "such acts as were necessary to the conducting of the business affairs *of her husband*," which did not include acting as a surety on a third party's debt. *Id.* at 357-58 (emphasis added). In short, *Clinton* provides no support whatever for the notion that the Kentucky Supreme Court would impose an express-authorization requirement on powers of attorney outside the context of arbitration.

demonstrates that the FAA broadly preempts *any* state-law rule that fails to "place arbitration agreements on an equal footing with other contracts" or that "stand[s] as an obstacle to the accomplishment of the FAA's objectives" of promoting arbitration. *Concepcion*, 563 U.S. at 339, 343. A rule requiring an explicit reference to arbitration before an agent can bind her principal to arbitration clearly falls into both prohibited categories. See Pet. 12-17; pp. 6-7, *supra*.

B. The FAA Fully Applies Here.

Unable to show that the decision below comports with the FAA, respondents remarkably insist that the FAA does not apply here at all—a position that even the majority below did not endorse. According to respondents, the FAA applies only to "dispute[s] regarding an arbitration agreement's validity," not to "dispute[s] as to whether an agreement was 'ever concluded.'" Opp. 16 (quoting *Buckeye*, 546 U.S. at 444 n.1).

Respondents are mistaken. To begin with, there is no contract-formation dispute here: each of the attorneys-in-fact here undisputedly entered into a written arbitration agreement on behalf of her principal, and the question is only whether those agreements should be enforced. That question is squarely governed by Section 2 of the FAA. See 9 U.S.C. § 2 (providing that written agreements to arbitrate disputes are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

In any event, parties cannot circumvent the FAA by designating discriminatory state-law rules as rules of contract formation. Indeed, this Court reject-

ed an analogous attempt by the respondents in *Imburgia*, who contended that the FAA was inapplicable because the dispute there involved the "threshold question of whether there's an arbitration agreement in the first place." Tr. of Oral Arg. at 30, *Imburgia*, 2015 WL 6552642, at *30; see also *id.* at *41, 46-47.

This Court squarely rebuffed that attempt to limit the FAA, recognizing that the question before it was whether the California court's "*interpretation* of [the] contract * * * is consistent with the [FAA]." *Imburgia*, 136 S. Ct. at 468 (emphasis added). It should do the same here.

Neither of respondents' authorities for the proposition that the FAA is categorically inapplicable to contract-formation disputes supports that approach. *Buckeye* drew a distinction between disputes over the validity of an arbitration agreement and disputes over whether a contract was formed only in order to explain that the former could be delegated to arbitrators while reserving decision on whether the latter could be delegated. It did not hold that formation disputes are beyond the reach of the FAA.

And in *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995), this Court held only that federal courts determine whether an arbitration agreement was formed based on "*ordinary* state-law principles that govern the formation of contracts." *Id.* at 944 (emphasis added). The Court did not hold, as respondents suggest, that state-court rules of contract formation—even those that single out arbitration for suspect status and reflect the judicial hostility that the FAA was enacted to prevent—are insulated from the FAA.

That suggestion fails as a matter of common sense. If respondents were correct, a state could enact a law expressly forbidding attorneys-in-fact to enter into arbitration agreements in any circumstance, or a law providing that state residents lack the capacity to enter into arbitration agreements unless they receive prior court approval, and those laws would be immune from federal scrutiny even if they blatantly disfavor arbitration. But States cannot circumvent the FAA simply by wrapping their hostility to arbitration in the mantle of "contract formation."

III. Summary Relief Is Appropriate.

As we suggested in the petition, the Court may wish to consider granting summary reversal in this case. Respondents have offered no persuasive rebuttal to our showing that the decision below impermissibly singles out arbitration agreements for disfavored treatment and is therefore preempted by the FAA and irreconcilable with this Court's precedents. There is no reason to think that respondents will have any more to say if plenary review is granted.

If the Court declines to reverse the judgment below summarily, it should in the alternative consider granting, vacating, and remanding the case in light of *Imburgia*. Respondents argue that the Kentucky Supreme Court has "already taken [*Imburgia*] into account" because petitioners cited it as supplemental authority at the rehearing stage (Opp. 30), but the Kentucky Supreme Court denied rehearing in a one-line summary order that neither analyzed *Imburgia* nor gave any indication that the court had confronted its reasoning. See Pet. App. 1a-2a.

An order by this Court granting, vacating, and remanding the decision below in light of *Imburgia*,

however, would force the Kentucky Supreme Court to confront and directly address the reasoning in *Imburgia*—and send a clear message that the Court below must comply with the FAA and this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal, or vacatur for reconsideration in light of *Imburgia*.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

SEPTEMBER 2016

FILED
AUG - 5 2016
OFFICE OF THE CLERK

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, ET AL., PETITIONERS

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE AMERICAN HEALTH CARE ASSOCIATION AND THE KENTUCKY ASSOCIATION OF HEALTH CARE FACILITIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

JAMES F. SEGROVES
Counsel of Record
KELLY A. CARROLL
DAVID J. VERNON
HOOPER, LUNDY & BOOKMAN, PC
401 Ninth Street, NW, Suite 550
Washington, DC 20004
(202) 580-7700
jsegroves@health-law.com

ELIZABETH A. JOHNSON
KENTUCKY ASSOCIATION OF HEALTH CARE FACILITIES
9403 Mill Brook Road
Louisville, KY 40223
(502) 425-5000

MARK E. REAGAN
HOOPER, LUNDY & BOOKMAN, PC
575 Market Street, Suite 2300
San Francisco, CA 94105
(415) 875-8500

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE QUESTION PRESENTED IS OF SIGNIFICANT LEGAL AND PRACTICAL IMPORTANCE 5

A. Powers of Attorney and Arbitration Agreements Are Essential Components of Contracting Within the LTC Profession 5

B. The Decision Below Creates Great Legal Uncertainty 6

II. DEFERRING REVIEW WILL EXACERBATE THE CONSIDERABLE BURDEN ALREADY IMPOSED BY THOSE WHO REFUSE TO ABIDE BY THIS COURT'S FAA JURISPRUDENCE 7

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases:

AT & T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) 10

ATAC Corp. v. Arthur Treacher's Inc., 280 F.3d 1091 (6th Cir. 2002) 14

Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011) 7

Bruner v. Timberland Manor Ltd. P'ship, 155 P.3d 16 (Okla. 2006) 8

Carter v. SSC Odin Operating Co., 927 N.E.2d 1207 (Ill. 2010) 9

Carter v. SSC Odin Operating Co., 976 N.E.2d 344 (Ill. 2012) 9

Diversicare Highland, LLC v. Lee, No. 3:15-cv-00836-GNS, 2016 WL 3512256 (W.D. Ky. June 22, 2016) 14

Fredericksburg Care Co. v. Perez, 461 S.W.3d 513 (Tex. 2015) 9

GGNSC Louisville Hillcreek, LLC v. Watkins, No. 3:15-cv-00902-DJH, 2016 WL 815295 (W.D. Ky. Feb. 29, 2016) 14

Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam) 2, 8

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 12

Owens v. Coosa Valley Health Care, Inc., 890 So. 2d 983 (Ala. 2004) 8

Cases—Continued: Page

Owensboro Health Facilities, L.P. v. Henderson, No. 4:16-cv-00002-JHM, 2016 WL 2853569 (W.D. Ky. May 13, 2016) 14

Preferred Care of Del., Inc. v. Crocker, --- F. Supp. 3d —, No. 5:15-cv-00177-TBR, 2016 WL 1181786 (W.D. Ky. Mar. 25, 2016) 12

Preston v. Ferrer, 552 U.S. 346 (2008) 10

Rainbow Health Care Ctr., Inc. v. Crutcher, No. 4:07-cv-00194-JHP, 2008 WL 268321 (N.D. Okla. Jan. 29, 2008) 8

Riney v. GGNSC Louisville St. Matthews, LLC, No. 3:16-cv-00122-JHM, 2016 WL 2853568 (W.D. Ky. May 13, 2016) 14

Spears v. United States, 555 U.S. 261 (2009) (per curiam) 15

Valley View Health Care, Inc. v. Chapman, 992 F. Supp. 2d 1016 (E.D. Cal. 2014) 8

Constitution:

U.S. Const. art. VI, cl. 2 (Supremacy Clause) 10

Statutes:

28 U.S.C. § 1331 12

Federal Arbitration Act, 9 U.S.C. §§ 1–16 ..... *passim*

9 U.S.C. § 2 3

9 U.S.C. § 16(b) 14

Miscellaneous: Page

AON Global Risk Consulting, *American Health Care Association Special Study on Arbitration in the Long Term Care Industry* (June 2009) 5

AON Global Risk Consulting, *Long Term Care: General Liability and Professional Liability Actuarial Analysis* (Nov. 2015).....6

Br. *Amicus Curiae* for AHCA in Supp. of Pet'rs, *Clarksburg Nursing & Rehab. Ctr., Inc. v. Marchio*, No. 11-394 (U.S. Oct. 28, 2011), 2011 WL 5189096 2

Cert. Pet., *TAMKO Bldg. Prods., Inc. v. Hobbs*, No. 15-1318 (U.S. Apr. 25, 2016), 2016 WL 1697855 15

Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong.....13

Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong.....13

Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. (2008).....13

Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009).....13

INTEREST OF *AMICI CURIAE*

The American Health Care Association (AHCA) is the Nation's leading association of long-term care and post-acute care providers, representing the interests of more than 12,000 non-profit and proprietary facilities. AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled Americans who live in skilled nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. AHCA advocates for quality care and services for frail, elderly, and disabled Americans. In order to ensure the availability of such services, AHCA also advocates for the continued vitality of the long-term and post-acute care provider community.[1]

One way in which AHCA promotes the interests of its members is by participating as an *amicus curiae* in cases before this Court with far-ranging consequences for its members. Such cases include those involving the proper application of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, in response to state judicial rulings inhibiting the use of arbitration to resolve disputes fairly and efficiently. *See, e.g.*, Br.

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The petitioners' and respondents' written consents to the filing of this brief have been filed with the Clerk. Counsel of record for petitioners and respondents received notice of the *amici*'s intent to file this brief more than ten days before the due date.

Amicus Curiae for AHCA in Supp. of Pet'rs, *Clarksburg Nursing & Rehab. Ctr., Inc. v. Marchio*, No. 11-394 (U.S. Oct. 28, 2011), 2011 WL 5189096; *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (per curiam) (granting *Clarksburg* petition in curve-lined cases where state court of last resort erroneously held that the FAA does not protect pre-dispute arbitration agreements covering claims of personal injury or wrongful death, summarily vacating state court's judgment, and remanding for further proceedings).

The Kentucky Association of Health Care Facilities (KAHCF) is a non-profit trade association representing approximately 200 licensed and certified nursing facilities throughout Kentucky. Founded in 1954, KAHCF is the primary advocacy organization for nursing facilities in Kentucky. KAHCF's mission is to promote quality long-term and post-acute care services and supports through advocacy, member services, education, and quality-achievement recognition. KAHCF advocates for its members in legislative, regulatory, and judicial settings to further the overall goals of its membership.

AHCA, KAHCF, and their respective members have a significant interest in the question presented by the petition for a writ of certiorari filed by Kindred Nursing Centers Limited Partnership, *et al.* (collectively, Kindred). The four-to-three decision of the Supreme Court of Kentucky at issue here held that powers of attorney authorizing attorneys-in-fact to enter into contracts do not include the authority to enter into one particular type of contract: arbitration agreements. Instead, the majority ruled that powers of attorney must contain an explicit, unambiguous

statement authorizing the attorney-in-fact to enter into arbitration agreements. That erroneous decision is emblematic of the struggle members of the long-term and post-acute care profession (collectively, LTC Profession) currently face in seeking judicial protection and enforcement of their federal arbitration rights. The majority decision below also is emblematic of the lengths to which certain state courts will go to impede the exercise of those rights by creating novel legal rules that single out arbitration for special treatment in spite of the FAA's admonition that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

SUMMARY OF ARGUMENT

The petition explains in detail (at 12–17) why the decision of the majority below conflicts with the FAA and this Court's decisions interpreting the statute. Rather than burden the Court by regurgitating those arguments, the *amici* wish to emphasize two additional reasons why timely intervention by this Court is necessary.

First, the question presented is of significant legal and practical importance. Individuals who require the assistance of the LTC Profession often are incapable of making decisions for themselves. As a result, powers of attorney granting the right to enter into contracts are a common and essential component of contracting within the LTC Profession. Arbitration agreements also are a common and essential component of contracting within the LTC Profession, which has long used arbitration as a means of ensuring timely, cost-effective, and fair dispute resolution. The

erroneous decision of the majority below throws into doubt the enforceability of countless such agreements. Moreover, the need for robust protection of federal arbitration rights is particularly acute in Kentucky, whose troubling litigation environment helps explain why a recent actuarial study of the LTC Profession found that Kentucky had the highest loss rate and claim severity of any State surveyed.

Second, deferring review will exacerbate the considerable burden already imposed by those who refuse to abide by this Court's FAA jurisprudence. The LTC Profession has borne the brunt of anti-arbitration efforts in courts throughout the United States. As a result, the LTC Profession has borne a disproportionate burden of having to defeat the numerous ways in which litigants and certain state courts seek to evade this Court's decisions interpreting the FAA. In many States, the protection and enforcement of federal arbitration rights still depends on whether the motion to compel arbitration will be decided in state or federal court. That unacceptable state of affairs currently exists on the very question presented in this case and will not be timely resolved unless this Court intercedes. The Court should do so and help bring a final end to the game of judicial whack-a-mole that has persisted in certain state courts unwilling to follow this Court's binding decisions interpreting the FAA.

ARGUMENT

I. THE QUESTION PRESENTED IS OF SIGNIFICANT LEGAL AND PRACTICAL IMPORTANCE

A. Powers of Attorney and Arbitration Agreements Are Essential Components of Contracting Within the LTC Profession

A significant percentage of individuals who require care by the LTC Profession are incapable of making informed decisions for themselves. Whether because of such things as accidental injury or disability resulting from the normal aging process, many individuals have planned for such an eventuality by executing general powers of attorney that give designated individuals authority to, among other things, enter into contracts on their behalf. The LTC Profession, in turn, depends on such powers of attorney to deliver timely care and to order its business affairs on a daily basis.

Arbitration agreements also are a common and essential component of contracting in the LTC Profession. Like many industry sectors, the LTC Profession has long used arbitration agreements as a means of facilitating timely and efficient dispute resolution. *See, e.g.*, AON Global Risk Consulting, *American Health Care Association Special Study on Arbitration in the Long Term Care Industry* 5 (June 2009) (describing history of profession's use of arbitration agreements and benefits of same), *available at* https://www.ahcancal.org (last visited Aug. 4, 2016).

Nowhere is the need for robust protection of federal arbitration rights more pronounced than in the jurisdiction giving rise to the petition in this case,

where the litigation environment is especially troubling for members of the LTC Profession. For example, a recent actuarial study of the LTC Profession performed by a leading provider of risk-management and insurance services found that Kentucky had the highest loss rate and claim severity of any State surveyed in 2015. AON Global Risk Consulting, *Long Term Care: General Liability and Professional Liability Actuarial Analysis* 30–31 (Nov. 2015), *available at* https://www.ahcancal.org (last visited Aug. 4, 2016); *see also id.* at 4 (defining "loss rate" as the "annual amount per occupied bed required to defend, settle or litigate claims in a given year"). That dubious distinction is expected to continue, as the projected loss rate in Kentucky for this year is almost *five times* the national average after growing exponentially over the past decade. *See id.* at 5, 30. Therefore, the jurisdiction giving rise to this case is an important battleground for federal arbitration rights.

B. The Decision Below Creates Great Legal Uncertainty

The majority below held that, before Kentucky's courts will enforce an arbitration agreement entered into by an attorney-in-fact pursuant to a power of attorney, the power of attorney must contain an explicit, unambiguous statement that it specifically authorizes the attorney-in-fact to enter into arbitration agreements. Pet. App. 41a. Language vesting an attorney-in-fact with authority to enter into contracts is insufficient. *Id.* at 42a.

That decision throws into doubt the enforceability of countless arbitration agreements. It is relatively uncommon for powers of attorney to satisfy the ex-

traordinary standard established by the majority below. Before that decision, there was no need to include such language because arbitration agreements are merely one form of contract that, under the FAA, cannot be singled out for special treatment. The decision of the majority below upends that reasonable expectation, and creates legal uncertainty that will undoubtedly spread to other jurisdictions hostile to the FAA.

II. Deferring Review Will Exacerbate the Considerable Burden Already Imposed By Those Who Refuse to Abide By This Court's FAA Jurisprudence

All manner of businesses and individuals rely on arbitration as a means of obtaining cost-effective and timely dispute resolution. In recent years, however, the profession at issue in this case has borne the brunt of anti-arbitration efforts in courts throughout the United States.

The official reporters of state and federal courts bear witness to the fact that nearly every argument imaginable has been made in an effort to impede the LTC Profession's invocation of its federal arbitration rights, often resulting in years of costly litigation at the trial and appellate levels. For example, those anti-arbitration efforts have included:

- Narrow constructions of the FAA and what types of arbitration agreements it protects. *See, e.g.*, *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 291 (W. Va. 2011) ("Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transac-

tion affecting interstate commerce."), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam).

- Narrow interpretations of what constitutes interstate commerce triggering the FAA's applicability. *Compare, e.g., Bruner v. Timberland Manor Ltd. P'ship*, 155 P.3d 16, 31 (Okla. 2006) ("The facts that the nursing home buys supplies from out-of-state vendors rather than in-state vendors and uses internet and long distance telephone lines do not demonstrate a substantial impact on interstate commerce . . . ."), *with Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016, 1039 (E.D. Cal. 2014) (finding state officials, who sought to defend anti-arbitration statutes and regulations targeting the LTC Profession, "raise[d] no legitimate dispute whether the issues at stake here involve interstate commerce"), *and Rainbow Health Care Ctr., Inc. v. Crutcher*, No. 4:07-cv-00194-JHP, 2008 WL 268321, at *6–7 (N.D. Okla. Jan. 29, 2008) (rejecting state official's reliance on *Bruner*'s interstate-commerce analysis and finding FAA preempted state anti-arbitration statute targeting the LTC Profession);
- Requests to create unconscionability rules that do not apply to contracts generally. *See, e.g., Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 989 (Ala. 2004) (rejecting tort plaintiff's request for a "per se rule that would find unconscionable any arbitration agreement involving a nursing home");

- Contentions that parties to arbitration agreements must have equal arbitral obligations in order for the agreements to be enforceable. *See, e.g.*, *Carter v. SSC Odin Operating Co.*, 976 N.E.2d 344, 353 (Ill. 2012) (finding FAA preempted intermediate appellate court's reliance on mutuality-of-obligation theory in case involving member of the LTC Profession);
- Arguments that the McCarran-Ferguson Act shields state anti-arbitration laws from FAA preemption. *See, e.g.*, *Fredericksburg Care Co. v. Perez*, 461 S.W.3d 513, 518–28 (Tex. 2015) (reversing intermediate appellate court's ruling that the McCarran-Ferguson Act "reverse preempted" state statute imposing unique formatting and signature requirements on arbitration agreements covering claims against the LTC Profession); and
- Efforts to defeat FAA preemption based on the constitutional origin of the right to a jury trial. *See, e.g.*, *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1220 (Ill. 2010) (rejecting State's argument, in a case addressing anti-arbitration statutes targeting the LTC Profession, "that the FAA should not be read to preempt state provisions precluding the waiver of jury trials because the right to a jury trial is a fundamental constitutional right").

Indeed, the "constitutional right" line of reasoning was used by the Supreme Court of Kentucky majority in this case despite the fact that the foundation for this Court's preemption jurisprudence—the Supremacy Clause of the United States Constitution—applies regardless of whether the contrary state rule

is embodied in a state constitution, statute, regulation, or judicial decision. *Compare* Pet. App. 43a (majority decision below emphasizing that the "drafters of [Kentucky's] Constitution deemed the right to a jury trial to be *inviolate*, a right that cannot be taken away; and, indeed, a right that is *sacred*, thus denoting that right and that right alone as a divine God-given right."), *with* U.S. Const. art. VI, cl. 2 (Supremacy Clause) ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the *Constitution* or Laws of any State to the Contrary notwithstanding.") (emphasis added).

The persistent refusal of certain state courts to abide by this Court's interpretation of the FAA imposes a disproportionate burden on the LTC Profession. As this Court has explained, a "prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (internal quotation marks and citation omitted). Therefore, the primary benefits of arbitration—"lower costs, greater efficiency and speed," *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (internal quotation marks and citation omitted)—are irretrievably lost in the litigation gauntlet many providers must run just to have their arbitration agreements judicially enforced. The simple truth is that in certain States, providers know that if they attempt to enforce arbitration agreements covering tort disputes, there is a significant possibility that they will have to undergo lengthy and costly litigation over the arbitration

agreements' enforceability. Such litigation often involves considerable discovery, motions practice, and mini-trials over such things as the process leading to the execution of the arbitration agreements, as well as lengthy appellate litigation exemplified by the bullet list of rulings found above and Kindred's *six-year* quest to have the arbitration agreements at issue here enforced.

Most troublingly, the enforceability of providers' arbitration agreements often depends on the answer to a single question having nothing to do with the merits of whether the agreements satisfy general contract principles: namely, will the motion to compel arbitration be decided in state or federal court? Nowhere is that unfortunate reality better demonstrated than with the question presented in this case. As the petition explains (at 17–19), federal district judges in Kentucky have resoundingly rejected the reasoning used by the Supreme Court of Kentucky majority and have instead adopted the lucid dissent authored by Justice Abramson (now Hughes), which was joined by two of her colleagues and which concluded that the majority's decision conflicted with this Court's decisions interpreting the preemptive effect of the FAA. *See* Pet. App. 51a–100a.

Those intent on defeating federal arbitration rights typically have the first say of deciding where that legal battle will be fought. Tort suits against the LTC Profession are usually filed in state court. Because such suits normally involve alleged damages greater than $75,000, one common tactic tort plaintiffs use to defeat removal of their case to federal district court is to name as defendants not only the corporate entity that operates the facility, but also at

least one individual who resides in the State in which the case is filed. Such individuals typically include the facility's administrator or director of nursing. In many instances, the facility's operator then faces a stark choice: (1) remain in state court, where in certain States a motion to compel arbitration will almost certainly be denied and require years of potentially fruitless appellate litigation; or (2) file an independent action against the tort plaintiff in federal district court, the sole purpose of which is to have the arbitration agreement enforced. The latter option, in turn, often leads to a race by the parties to have one court rule on the arbitration agreement's enforceability before the other court can do so, which presents significant comity and abstention concerns. *Cf. Preferred Care of Del., Inc. v. Crocker*, --- F. Supp. 3d ---, No. 5:15-cv-00177-TBR, 2016 WL 1181786, at *11 (W.D. Ky. Mar. 25, 2016) ("Frankly, this Court is troubled and hesitant in disagreeing with the majority of the Kentucky Supreme Court [in this case].").

Not all providers have this luxury. For one thing, a provider's domestic citizenship may make it incapable of invoking the diversity-of-citizenship jurisdiction necessary for an independent federal action. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) ("The [FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 . . . or otherwise."). Even if the provider's citizenship is different from that of the tort

plaintiff, the provider may simply lack the resources necessary to fund the simultaneous defense of a state-court suit and the prosecution of a federal-court suit.

Members of the LTC Profession should not have to make such expensive choices just to have their rights under the FAA respected. In effect, anti-arbitration forces have created a litigation environment in which many members of the LTC Profession reasonably question whether standing up for their federally protected arbitration rights is worth the cost. The net result is a *de facto* repeal of the FAA as it applies to the LTC Profession in certain jurisdictions, something which Congress has rejected.[2]

Deferring review in this case will only embolden litigants and state courts opposed to this Court's FAA jurisprudence and who are intent on undermining its application to the LTC Profession. Moreover, to those who might argue that the question presented should be allowed to percolate in order to permit

---

[2] In the past decade, at least five bills have been introduced that would have amended the FAA to invalidate pre-dispute arbitration agreements between nursing facilities and their residents. Not a single one has received a vote by the full Senate or the House of Representatives. *See* Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. § 3(4) (2008) (proposing to amend the FAA to expressly provide that pre-dispute arbitration agreements between nursing facilities and their residents "shall not be valid or specifically enforceable"); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. § 2(a) (same); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. § 3(4) (2009) (same); Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong. § 2(a) (same).

the United States Court of Appeals for the Sixth Circuit to give its views on the legality of the rule established by the majority below, it should be noted that the Sixth Circuit is unlikely to do so in the foreseeable future. Most of the federal district court decisions rejecting the majority opinion have done so in the context of granting a motion to compel arbitration and have stayed litigation pending the completion of arbitration. *See, e.g.*, *Diversicare Highland, LLC v. Lee*, No. 3:15-cv-00836-GNS, 2016 WL 3512256, at *7 (W.D. Ky. June 22, 2016); *Riney v. GGNSC Louisville St. Matthews, LLC*, No. 3:16-cv-00122-JHM, 2016 WL 2853568, at *4 (W.D. Ky. May 13, 2016); *Owensboro Health Facilities, L.P. v. Henderson*, No. 4:16-cv-00002-JHM, 2016 WL 2853569, at *5 (W.D. Ky. May 13, 2016); *GGNSC Louisville Hillcreek, LLC v. Watkins*, No. 3:15-cv-00902-DJH, 2016 WL 815295, at *7 (W.D. Ky. Feb. 29, 2016). The law of the Sixth Circuit provides that such decisions are subject to appellate review as of right only *after* the underlying dispute is fully arbitrated and, in the unlikely event the tort plaintiff still wishes to challenge the district court's ruling on the motion to compel arbitration, *after* the completion of all proceedings in the district court with respect to the arbitration award. *See ATAC Corp. v. Arthur Treacher's Inc.*, 280 F.3d 1091, 1101 (6th Cir. 2002); *see also* 9 U.S.C. § 16(b) (providing that, in general, "an appeal may *not* be taken from an interlocutory order . . . granting a stay of any action under section 3 of this title . . . [or] directing arbitration to proceed under section 4 of this title") (emphasis added).

Accordingly, timely intervention by this Court is necessary. The rule established by the Supreme

Court of Kentucky majority conflicts with this Court's decisions interpreting the FAA and imposes a significant burden on the LTC Profession on a recurring legal issue of great practical importance. This Court should "promptly remove from the menu the [Supreme Court of Kentucky's] offering, a smuggled-in dish that is indigestible." *Spears v. United States*, 555 U.S. 261, 267 (2009) (per curiam).[3]

---

[3] The *amici* note that a similar question is presented in *TAMKO Building Products, Inc. v. Hobbs*, No. 15-1318, which asks "[w]hether a state court can evade the preemptive force of the [FAA] by framing its refusal to enforce an arbitration agreement as a product of supposed defects in 'contract formation' that would not prevent the formation of any other contract." Cert. Pet. at i, *TAMKO Bldg. Prods., Inc. v. Hobbs*, No. 15-1318 (U.S. Apr. 25, 2016), 2016 WL 1697855. The Court has called for a response to the petition in *TAMKO*, which is due September 13, 2016.

CONCLUSION

For the foregoing reasons and those contained in Kindred's petition, the petition should be granted.

Respectfully submitted.

JAMES F. SEGROVES
Counsel of Record
KELLY A. CARROLL
DAVID J. VERNON
HOOPER, LUNDY & BOOKMAN, PC
401 Ninth Street, NW, Suite 550
Washington, DC 20004
(202) 580-7700
jsegroves@health-law.com

MARK E. REAGAN
HOOPER, LUNDY & BOOKMAN, PC
575 Market Street, Suite 2300
San Francisco, CA 94105
(415) 875-8500

ELIZABETH A. JOHNSON
KENTUCKY ASSOCIATION OF HEALTH CARE FACILITIES
9403 Mill Brook Road
Louisville, KY 40223
(502) 425-5000

AUGUST 2016

RECORD AND BRIEFS

No. 16-32

Supreme Court, U.S.
FILED
AUG 5 2016
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION,

Petitioners,

v.

JANIS E. CLARK, Executrix of the Estate of OLIVE G. CLARK, deceased, and on behalf of the wrongful death beneficiaries of OLIVE G. CLARK; and BEVERLY WELLNER, Individually and on behalf of the Estate of JOE P. WELLNER, deceased, and on behalf of the Wrongful Death Beneficiaries of JOE P. WELLNER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF *AMICUS CURIAE* FOR GENESIS HEALTHCARE, INC., DIVERSICARE HEALTHCARE SERVICES, INC., GGNSC LOUISVILLE MT. HOLLY LLC D/B/A GOLDEN LIVINGCENTER – MT. HOLLY, BROOKDALE SENIOR LIVING INC., SIGNATURE HEALTHCARE, LLC, HCR MANORCARE AND KENTUCKY PARTNERS MANAGEMENT, LLC IN SUPPORT OF THE PETITIONERS

DONALD L. MILLER, II
Counsel of Record
KRISTIN M. LOMOND
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
9300 Shelbyville Road, Suite 400
Louisville, KY 40222
(502) 423-6390
dmiller@qpwblaw.com
klomond@qpwblaw.com
Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM
Number of Copies

QUESTION PRESENTED

Whether the FAA preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
IDENTITY AND INTERESTS OF THE *AMICI*	1
STATUTORY PROVISIONS INVOLVED	
STATEMENT	4
SUMMARY OF THE ARGUMENT	7
ARGUMENT IN SUPPORT OF THE PETITION	9
I. FOR ARBITRATION CONTRACTS, *WHISMAN* APPLIED DIFFERENT RULES AND DEMANDED SPECIFICITY FOR ENFORCEMENT NOT REQUIRED FOR OTHER CONTRACTS	10
II. *WHISMAN* IGNORES THE FAA'S PROHIBITION AGAINST ELEVATED STANDARDS FOR ARBITRATION CONTRACTS	11
III. *WHISMAN* INCORRECTLY BASED ITS HOLDING ON A "GOD-GIVEN RIGHT" TO JURY TRIAL: NO SUCH "RIGHT" EXISTS OR WAS EVER IMPLICATED	12
IV. *WHISMAN*'S APPLICATION TO VALID ARBITRATION AGREEMENTS VIOLATES FUNDAMENTAL CONSTITUTIONAL RIGHTS	15

TABLE OF CONTENTS – Continued

Page

A. *Whisman* Violates the Due Process Clause of the Fourteenth Amendment by Impairing the Fundamental Federal Right to Contract 17

B. *Whisman* Violates the Equal Protection Clause of the Fourteenth Amendment by Refusing to Treat Long-Term Care Providers Similarly 19

V. STATE COURT RESTRICTIONS ON ARBITRATION RIGHTS POSE A SUBSTANTIAL THREAT TO AN INCREASINGLY IMPORTANT INDUSTRY 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Allgeyer v. Louisiana, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897) 18

Ally Cat, LLC v. Chauvin, 274 S.W.3d 451 (Ky. 2009) 20

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) 9, 11, 15

Atlas Roofing Co., Inc. v. Occupational Safety, Etc., 430 U.S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977) 13

Brown v. Hoblitzell, 307 S.W.2d 739 (Ky. 1956) 12

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) 20

Cremin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460 (N.D. Ill. 1997) 14

DirecTV, Inc. v. Imburgia, 577 U.S. ___, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015) 9

D.F. v. Codell, 127 S.W.3d 571 (Ky. 2003) 21

EJS Properties, LLC v. City of Toledo, 698 F.3d 845 (6th Cir. 2012) 19

Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306 (Ky. 2016) ..... *passim*

Ferguson v. Skrupa, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963) 18

Geldermann Inc. v. Commodity Futures Trading Comm., 836 F.2d 310 (7th Cir. 1987) 14

TABLE OF AUTHORITIES – Continued

Page

Granfinanciera v. Nordberg, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989) 13, 14

Grosjean v. Am. Press Co., 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936) 17

Hines v. Davidowitz, 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581 (1941) 15

Illyes v. John Nuveen & Co., Inc., 949 F. Supp. 580 (N.D. Ill. 1996) 14

Kentucky Comm'n on Human Rights v. Fraser, 625 S.W.2d 852 (Ky. 1981) 13

Kirby v. Lexington Theological Seminary, 426 S.W.3d 597 (Ky. 2014) 18

Kodak Mining Co. v. Carrs Fork Corp., 669 S.W.2d 917 (Ky. 1984) 20

Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) 18

Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) 9

Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909 (N.D. Tex. 2000) 14

Martin v. Hunter's Lessee, 1 Wheat 304, 14 U.S. 304, 4 L. Ed. 97 (1816) 5

Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ, 290 S.W.3d 681 (Ky. App. 2009) 20

Miller v. Johnson Controls, Inc., 296 S.W.3d 392 (Ky. 2009) 17

TABLE OF AUTHORITIES – Continued

Page

Nat'l Iranian Oil Co. v. Ashland Oil, Inc., 716 F. Supp. 268 (S.D. Miss. 1989) 14

Perry v. Thomas, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) 16

Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334 (7th Cir. 1984) 14

Poggel v. Louisville Ry. Co., 225 Ky. 784, 10 S.W.2d 305 (1928) 20

Preferred Care of Delaware, Inc. v. Hopkins, 2016 WL 3546407, Case No. 5:15-CV-00191-GNS-LLK (W.D. Ky., June 23, 2016) 10

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) 16

Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) 18

Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975) 13

Schnuerle v. Insight Communications Co., L.P., 376 S.W.3d 561 (Ky. 2012) 19

Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) 17, 18

Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) 16

Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302 (4th Cir. 2001) 14

TABLE OF AUTHORITIES – Continued

Page

Vision Mining, Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011) 20, 21

Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) 18, 19

Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944) 13

CONSTITUTIONAL PROVISIONS

Article III of the U.S. Constitution 13

Due Process Clause of the Fourteenth Amendment to the U.S. Constitution 8, 15, 17, 18, 19

Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution 8, 15, 19, 20, 21

Supremacy Clause of the U.S. Constitution, Art. VI, cl.2 9

Seventh Amendment to the U.S. Constitution 7, 8, 14, 15

KENTUCKY CONST. § 1 21

KENTUCKY CONST. § 2 21

KENTUCKY CONST. § 3 21

KENTUCKY CONST. § 7 ..... 7, 12, 14, 15

KENTUCKY CONST. § 25 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Federal Arbitration Act, 9 U.S.C. §§ 1-16 ..... *passim*

Kentucky Revised Statute § 402.050 11

Kentucky Revised Statute § 625.090 11

RULES AND REGULATIONS

Federal Rule of Civil Procedure 38(d) 12

Kentucky Rule of Civil Procedure 38.04 12

OTHER

5 MOORE'S FEDERAL PRACTICE 38.08 13

$65 billion in Medicare cuts to rock U.S. nursing homes over 10 years, analysis shows, McKnight's Long-Term Care News (Aug. 2, 2012), http://www.mcknights.com/65-billion-in-medicare-cuts-to-rock-us-nursing-homes-over-10-years-analysis-shows/article/253036 23

Editorial, *When People Sign Away Their Right to Sue*, N.Y. TIMES, July 25, 2016 21

Philip Moeller, *Nursing Homes Squeezed by Medicare Cuts*, U.S. News Money (Aug. 8, 2011), http://money.usnews.com/money/blogs/the-best-life/2011/08/08/nursing-homes-squeezed-by-medicare-cuts 23

U.S. Dep't of Health & Human Servs., Admin, on Aging, *Aging Statistics*, http://www.aoa.gov/aoaroot/aging_statistics/index.aspx 22

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Genesis Healthcare, Inc., Diversicare Healthcare Services, Inc., GGNSC Louisville Mt. Holly LLC d/b/a Golden LivingCenter – Mt. Holly, Brookdale Senior Living Inc., Signature HealthCARE, LLC, HCR ManorCare and Kentucky Partners Management, LLC, respectfully submit this *Amicus Curiae* brief in support of Petitioners.[1]

IDENTITY AND INTERESTS OF THE *AMICI*

Amicus curiae Genesis Healthcare, Inc. is a holding company with subsidiaries that, on a combined basis, comprise one of the nation's largest post-acute care providers with more than 500 skilled nursing centers and senior living communities in 34 states nationwide. Genesis subsidiaries also supply rehabilitation therapy to more than 1600 locations in 46 states and the District of Columbia.

Amicus curiae Diversicare Healthcare Services, Inc., headquartered in Brentwood, Tennessee, employs

[1] Pursuant to Supreme Court Rule 37.2(a), notice of the *Amici*'s intent to file this brief was received by all counsel of record for all parties more than 10 days before the brief's due date. Petitioner and Respondent consented to filing. The undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

6300 people offering wide-ranging, post-acute care in multiple settings, to include: complex medical, skilled nursing, short-term rehabilitative, long-term residency, memory assistance, respite and hospice care. Through a subsidiary, Diversicare operates 55 skilled nursing and long-term care facilities in nine Southern and Midwestern states.

Amicus curiae GGNSC Louisville Mt. Holly LLC d/b/a Golden LivingCenter – Mt. Holly is a member of a family of companies based in Plano, Texas. The Golden Living family of companies includes Golden LivingCenters, Aegis Therapies, AseraCare, and 360 Healthcare Staffing. There are 300 Golden LivingCenters in 21 states. Golden Living also offers assisted living services at more than 30 of its locations. Golden Living companies provide services to over 1000 nursing homes, hospitals, and other healthcare organizations in 40 states and the District of Columbia. The Golden Living family of companies has more than 40,000 employees who provide healthcare to over 60,000 patients daily.

Amicus curiae Brookdale Senior Living Inc., based in Brentwood, Tennessee, operates 647 senior care communities in 36 states, including 74 retirement centers, 440 assisted living communities and 41 continuing care retirement centers. Brookdale communities have the ability to serve approximately 66,000 residents daily.

Amicus curiae Signature HealthCARE, LLC, is a Kentucky based long-term health care and rehabilitation company with 143 different facility locations (46 of them in Kentucky) that span across 11 different states, providing jobs to nearly 24,000 employees. A growing number of Signature centers are earning five-star ratings from the Centers for Medicare & Medicaid Services. Signature was named "Best Places to Work in KY" in 2014 and 2015 by the Kentucky Chamber of Commerce, and was nationally awarded by Modern Healthcare in 2013 and 2015.

Amicus curiae HCR ManorCare is a leading provider of short-term, post-hospital services and long-term care with a network of more than 500 skilled nursing and rehabilitation centers, memory care communities, assisted living facilities, outpatient rehabilitation clinics, and hospice and home health care agencies. Based in Toledo, Ohio, ManorCare employs more than 50,000 caregivers nationwide.

Amicus curiae Kentucky Partners Management, LLC, based in Plano, Texas, manages 21 skilled nursing facilities in the Commonwealth of Kentucky, which includes 1762 nursing beds. Services offered at these nursing facilities include skilled nursing, short-term rehabilitative, long-term residency, and hospice care.

Predispute arbitration agreements represent efficient, cost-effective alternatives to traditional civil litigation, vital to *Amici* and the entire long-term care industry. Arbitration agreements aid cost reduction, retaining more resources for resident care and claim

resolution. *Amici* typically present residents with arbitration agreements upon admission. Some are standalone agreements; some form part of the admissions agreement. *Amici* enter into thousands of arbitration agreements every year, many executed by an attorney-in-fact for the resident, as in the *Whisman* cases. Because of their genuine interest in promoting consistent enforcement of valid arbitration agreements, *Amici* strongly encourage the Court to grant the Petition.

STATEMENT

Venue should play no part in substantive law, but it means everything in Kentucky after *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016).[2]

Justice Story long ago premonished the Court's need to review *Whisman*:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might . . . never

[2] *See* Petition at pp. 17-20. *Every* Kentucky federal district court to consider *Whisman*'s rule has held *Whisman* violates the FAA. Kentucky state courts are bound by Court Rule to follow *Whisman*. *See* Rules of Kentucky Supreme Court 1.030(8) and 1.040(5).

> have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable[.]

Martin v. Hunter's Lessee, 1 Wheat 304, 348, 14 U.S. 304, 348, 4 L. Ed. 97 (1816).

Whisman creates precisely the "deplorable" state envisioned: Kentucky parties to arbitration agreements must "race to the courthouse": to avoid enforcement of an arbitration agreement, Kentucky state courthouses. Kentucky's federal district courts provide the alternative for those hoping to enforce arbitration contracts. Unfortunately, Kentucky citizens lacking diversity to remove or file an original federal action often lose their right to enforce valid arbitration contracts.

Amici adopt and rely upon the facts as Petitioners set forth in their brief, and here provide only a summary of pertinent facts. *Whisman* arose from a long-term care facility's attempt to enforce arbitration agreements executed between it and its residents' agents in Kentucky state courts.[3] Pet. App. 7a. The residents' powers of attorney documents ("POAs") designated the agents and their specific grants of power. *See* Pet. App. 12a-23a. Each POA granted the power to make and execute contracts, specifically and without

---

[3] All arbitration agreements considered in *Whisman* were optional and not a condition of admission. Pet. App. 17a.

limitation. Pet. App. 19a; 22a.[4],[5] In both cases addressed in the Petition, *Whisman* held these powers to be insufficient for the attorney-in-fact to enter into, or enforce, an *arbitration* contract, specifically. Pet. App. 50a. The Supreme Court of Kentucky refused to enforce the agent-entered predispute arbitration contracts for reasons not applicable to any other contracts under Kentucky law, reasoning that arbitration contracts waived a "God-given right" to a jury trial and such waiver could not be inferred from a "less than explicit grant" of the power to execute contracts in general. Pet. App. 40a; 43a.

---

[4] Olive Clark's "General Durable Power of Attorney to Conduct All Business and Personal Affairs of Principal" granted her attorney-in-fact, "with full power for me and in my name . . . in her sole discretion" to "transact, handle, and dispose of all matters affecting me and/or my estate in any possible way." Pet. App. 18a. Her POA granted powers to "draw, make and sign in my name any and all checks, promissory notes, *contracts*, deeds or *agreements*." Pet. App. 19a (emphasis added). Her POA granted authority to "institute or defend suits concerning my property or rights," and "Generally to do and perform for me and in my name all that I might do if present." Pet. App. 19a.

[5] Joe Wellner's Power of Attorney document granted his attorney-in-fact powers to "make, execute and deliver deeds, releases, conveyances and *contracts of every nature* in relation to both real and personal property, including stocks, bonds and insurance." Pet App. 22a (emphasis added). His POA contained additional grants to "demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor)." Pet. App. 21a.

SUMMARY OF THE ARGUMENT

Amici request this Court's review because *Whisman* so disproportionately burdens long-term care providers given the industry's regular use of agent-executed predispute arbitration agreements. A significant number of long-term care residents, because of age or infirmity, utilize powers of attorney designating individuals authorized to conduct their business and personal affairs, including the right to enter into all types of contracts for their resident. The Federal Arbitration Act ("FAA") says arbitration contracts must be enforced like all other contracts. *Whisman* elevates the standard for enforcement of agent-executed arbitration contracts beyond that required for enforcement of any other agent-executed contract. *Whisman*'s standard exacerbates the progressively inordinate hardships borne predominately by long-term care entities seeking enforcement of their federal arbitration rights.

Whisman refused to acknowledge that courts and legislatures can set higher standards for a multitude of rights, including constitutionally protected rights, because no federal law prohibits those elevated standards. On the contrary, the FAA does prohibit higher standards for arbitration contracts as opposed to other contracts.

Whisman grounded its holding on the erroneous premise that a party waives his/her fundamental "right to jury trial," provided by the Seventh Amendment and Section 7 of the Kentucky Constitution, by

signing a predispute arbitration agreement. The Seventh Amendment protects and preserves, but does not confer, a "right" to jury trial. Having executed predispute arbitration agreements to resolve their claims in a non-judicial forum prior to any claim having arisen, the "right" to jury trial was never implicated in the *Whisman* cases. The very basis of *Whisman*'s holding is incorrect.

Whisman by state action violates long-term care providers' constitutional right to enter into contracts as guaranteed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Kentucky's highest court singles out the long-term care industry in *Whisman*, targeting its reasoning to "nursing homes" in violation of the Fourteenth Amendment's Equal Protection Clause. *See* Pet. App. 43a; 44a; 46a. The long-term care industry should not be singled out as required to divert valuable resources to litigation unnecessarily.

Whisman's result-oriented reasoning finds no credible basis in this Court's precedent. By excepting agent-executed arbitration contracts as "different" from all other agent-executed contracts and requiring a higher standard for their enforcement, *Whisman* rejects this Court's precedent that arbitration contracts must be enforced on "equal footing" with other contracts. Kentucky attempted to disguise its discriminatory reasoning as neutral agency law, relying on a "God-given right" to a jury trial. *Whisman* all but taunts this Court's precedent. Absent review, *Whisman* bestows a convoluted loophole for skirting the FAA.

Amici request this Court grant review and reverse *Whisman*.

ARGUMENT IN SUPPORT OF THE PETITION

The Supremacy Clause forbids state courts from dissociating themselves from federal law they do not like. *Cf., DirecTV, Inc. v. Imburgia*, 577 U.S. ___, 136 S. Ct. 463, 468, 193 L. Ed. 2d 365 (2015). "[T]he Judges of every State shall be bound" by "the Laws of the United States." U.S. Constitution, Art. VI, cl.2. Undaunted, the Supreme Court of Kentucky "rejected the notion" that its tortured holding conflicted with this Court's decisions in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), on grounds that "our holding does not prohibit arbitration of any 'particular type of claim.'" Pet App. 46a.

The Petition demonstrates convincingly that *Whisman*'s decision overtly violates the FAA and conflicts with this Court's arbitration precedents and numerous federal district courts' holdings that an agent's "power to contract" provides authority to contract *for arbitration*. *Whisman* all but proclaims the Kentucky court's judicial hostility towards arbitration, moving district Judge Stivers of the Western District of Kentucky to comment:

> Applying *Whisman* to invalidate the arbitration agreement signed by Decedent's husband

> would run afoul of the FAA. Although the Kentucky Supreme Court's antipathy for arbitration was more subtly expressed in its earlier decision in *Ping* [*v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012)], its true colors were revealed fully in *Whisman*. . . . [T]he rule expressed in *Whisman* contravenes the FAA[.]

Preferred Care of Delaware, Inc. v. Hopkins, 2016 WL 3546407 (W.D. Ky., June 23, 2016).

Whisman particularly flaunted its animus of arbitration contracts used in long-term care settings. *Whisman*'s aftermath leaves a significant jurisprudential divide between Kentucky's state and federal trial courts. *Amici* support Petitioners' arguments explaining why *Whisman* violates the FAA and federal substantive arbitration law. *Amici* write separately to provide additional reasons in support of the Petition.

I. FOR ARBITRATION CONTRACTS, *WHISMAN* APPLIED DIFFERENT RULES AND DEMANDED SPECIFICITY FOR ENFORCEMENT NOT REQUIRED FOR OTHER CONTRACTS

Whisman continues state courts' campaign to find nuanced, state-law "loopholes" to avoid arbitration enforcement in long-term care settings. Arbitration concerns the forum only, not the claim or the damages recoverable. Yet *Whisman* unapologetically champions a preference for judicial trials over arbitration, disfavoring arbitration and violating this Court's precedent.

See Pet. App. 89a (Abramson, J., dissenting). *Cf., Concepcion*, 63 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742.

A significant number of long-term care residents, because of age or infirmity, utilize powers of attorney designating individuals to conduct their business and personal affairs, often including the right to enter into all types of contracts for the resident. *Whisman* elevates the standard for enforcing agent-executed *arbitration* contracts above the standard required for all other agent-executed contracts. *Amici* and long-term care industry members need this Court to act. The Court has long-recognized that reliance on well-settled law is an important legal principal and business condition. *Whisman*'s decision overtly conflicts and even disregards this Court's arbitration precedents. As the Petition shows, Kentucky's federal district courts unanimously find *Whisman* violates the FAA. *See* Petition, pp. 17-23. Absent review, the long-term care industry can count on inconsistent enforcement, at best.

II. *WHISMAN* IGNORES THE FAA'S PROHIBITION AGAINST ELEVATED STANDARDS FOR ARBITRATION CONTRACTS

Highlighting the *Whisman* court's error is its refusal to acknowledge that courts and legislatures can indeed set higher standards for parental rights, slavery and marriage, to name a few of *Whisman*'s "comparisons," because no federal law prohibits those elevated standards. *See, e.g.*, Pet. App. 42a; *see also* KRS § 625.090; KENTUCKY CONST. § 25; and KRS

§ 402.050. *Whisman* ignores that the FAA does prohibit higher standards for arbitration contracts as compared to other contracts. This fact renders meaningless *Whisman*'s comparison to waivers of other fundamental rights. *See, e.g.*, Pet. App. 97a (Abramson, J., dissenting). Notwithstanding its dislike for the federal mandate, "redefining" or "elevating" the standard for enforcing agent-executed arbitration contracts is simply preempted by the FAA and this Court's substantive arbitration precedent.

III. *WHISMAN* INCORRECTLY BASED ITS HOLDING ON A "GOD-GIVEN RIGHT" TO JURY TRIAL: NO SUCH "RIGHT" EXISTS OR WAS EVER IMPLICATED

Whisman grounded its decision on the erroneous premise that its agents waived their residents' "God-given right" to jury trial under the Seventh Amendment and Section 7 of the Kentucky Constitution by signing arbitration agreements. Pet. App. 43a. In fact, no jury waiver occurred because no jury "right" ever existed with respect to those claims.

Obviously, a jury trial is absolutely not a "God-given right," but rather a right provided under the terms and conditions of a constitution written and adopted by its people. It is alienable. In fact, one can easily waive one's right to jury trial simply by not asking for it. *See* Fed. R. Civ. P. 38(d); Kentucky Rule Civ. P. 38.04. *See also Brown v. Hoblitzell*, 307 S.W.2d 739

(Ky. 1956). Waivers by omission do not violate the Constitution. *See Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 674 (9th Cir. 1975) (citing 5 MOORE'S FEDERAL PRACTICE 38.08, p. 83, n. 68). This Court stated:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 677, 88 L. Ed. 834 (1944). It follows that a "waiver" by affirmatively entering into a contract does not violate the Constitution. The *Whisman* decision is not supported by the laws of this Court.

The Seventh Amendment provides that jury trials in suits at common law are "preserved." Neither the Seventh Amendment nor Section 7 of the Kentucky Constitution creates a jury trial right. Both, by their terms, simply "preserve" that right as it already existed at common law. *See Atlas Roofing Co., Inc. v. Occupational Safety, Etc.*, 430 U.S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977). *See also Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981).

Following the analysis in *Granfinanciera v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989), in situations where Congress assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a fact finder, there

is no right to a jury trial. *Id.* at 54, 109 S. Ct. at 2796. The Seventh Amendment does not confer the right to a jury trial, only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes. *See Cremin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1471 (N.D. Ill. 1997).

The right to a trial by jury is necessarily incident to, and predicated upon, the right to a judicial forum. *See, e.g.*, *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 921-22 (N.D. Tex. 2000). Consequently, the "right" to a jury trial, under either the Seventh Amendment or Section 7 of Kentucky's Constitution, is not implicated by a contractual provision that precludes access to a judicial forum. *Id.* at 921-22 (citing *Geldermann Inc. v. Commodity Futures Trading Comm.*, 836 F.2d 310, 323 (7th Cir. 1987); *Illyes v. John Nuveen & Co., Inc.*, 949 F. Supp. 580, 584 (N.D. Ill. 1996). *See also Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 716 F. Supp. 268, 270 (S.D. Miss. 1989). "The 'loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.'" *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (quoting *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984)).

No claims against the nursing home had yet arisen in any court at the time Ms. Clark's and Mr. Wellner's agents executed the arbitration contracts. Pet. App. 32a ("An arbitration agreement signed *before*

a cause of action exists cannot be 'reasonably necessary' to the resolution of that cause.") (Emphasis added). The *Whisman* court failed to comprehend the truth of its errant analysis: no "right" to jury trial exists *until* it is determined that litigation should proceed before a court. Having executed *predispute* arbitration contracts before a claim arose, neither the Seventh Amendment nor Section 7 of the Kentucky Constitution was ever implicated.

IV. *WHISMAN*'S APPLICATION TO VALID ARBITRATION AGREEMENTS VIOLATES FUNDAMENTAL CONSTITUTIONAL RIGHTS

The Kentucky court, by state action in *Whisman*, violated the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the long-term care provider's attendant rights thereunder by impairing its fundamental right to enter into contracts with agents acting under powers of attorney, and unfairly discriminating against enforcement of the long-term care provider's arbitration contracts with its residents.

A "state law that 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' is preempted by the Supremacy Clause." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). As federal substantive law, the FAA preempts all contrary or inconsistent state law. *See Concepcion*, 563 U.S. 333. The *Whisman* Court agreed the FAA governed the arbitration agreement at

issue. Pet. App. 24a. As Justice Thurgood Marshall explained:

> A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of §2. . . . A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (emphasis original). Regardless, the *Whisman* court likely invalidated countless arbitration contracts signed by agents under powers-of-attorney without even considering those ramifications because it so detests the agreements in the nursing home context.

A. *Whisman* Violates the Due Process Clause of the Fourteenth Amendment by Impairing the Fundamental Federal Right to Contract.

The Due Process Clause of the Fourteenth Amendment provides and protects the fundamental right to enter into contracts, which includes entering contracts with agents acting under powers of attorney. *Whisman*'s application violates the Due Process Clause by impairing long-term care providers', including *Amici*'s, federal common law right to enter into contracts.[6]

The Supreme Court of Kentucky itself previously acknowledged, "[t]he term 'due process' has two meanings in American jurisprudence: (1) substantive due process, which is based on the idea that some rights are so fundamental that the government must have an exceedingly important reason to regulate them, if at all, such as the right to free speech or to vote; and (2) procedural due process, which requires the government to follow known and established procedures, and not to act arbitrarily or unfairly in regulating life, liberty or property." *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 397 (Ky. 2009). In *Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), this Court explained "[t]hat the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the

---

[6] It is well established that a corporation is a "person" within the meaning of the due process of law and equal protection clauses of the Fourteenth Amendment. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 447, 80 L. Ed. 660 (1936).

Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *See also Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 619 (Ky. 2014) (citing *Shelley* for the proposition that decisions of both legislature and judiciary are considered state actions).

The Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772 (1997). This Court long ago recognized that the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897); *see also Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (*overruled on other grounds*, *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963)).

The Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993). The right to contract is a long-recognized liberty interest. The "Fourteenth Amendment liberty includes the right . . .

to enter into all contracts which may be proper, necessary and essential" to a citizen's needs. *See EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 859 (6th Cir. 2012) (citing *Glucksberg*, 521 U.S. at 760) (internal quotation marks omitted).

By requiring a specific grant of authority solely for enforcement of an arbitration contract, versus other contracts, *Whisman* flagrantly infringes on a long-term care provider's right to enter into an arbitration contract with an agent empowered to make all contracts on her principal's behalf. *Whisman* places agent-executed arbitration contracts into a special category with a different standard for enforcement, directly violating the FAA, and its application impairs *Amici*'s fundamental right to contract. Application of the *Whisman* Court's rule of law virtually eliminates *Amici*'s right to enter into arbitration contracts freely with their residents' agents – who otherwise hold the unqualified power to execute "any and all contracts" – violating *Amici*'s Fourteenth Amendment substantive due process right to make and enter into contracts.

B. *Whisman* Violates the Equal Protection Clause of the Fourteenth Amendment by Refusing to Treat Long-Term Care Providers Similarly

Kentucky Courts are willing to enforce some arbitration contracts, but apparently not all. In *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561 (Ky. 2012), the court held that "arbitration is a favored

method of dispute resolution. 'Arbitration has always been favored by the courts.' *Poggel v. Louisville Ry. Co.*, 225 Ky. 784, 10 S.W.2d 305, 310 (1928). 'Kentucky law favors the enforcement of arbitration agreements.' *Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ*, 290 S.W.3d 681, 685 (Ky. App. 2009) (citing *Kodak Mining Co. v. Carrs Fork Corp.*, 669 S.W.2d 917 (Ky. 1984)); *see also Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 457 (Ky. 2009)." But, in refusing to honor agent-executed arbitration contracts involving long-term care facilities, the *Whisman* court brazenly singled out the long-term care industry in its holding. *See* Pet. App. 46a ("Nursing home facilities may still enforce arbitration agreements with their residents when the resident has signed the agreement or validly authorized his agent to sign in his stead."). *See also* Pet. App. 43a ("A durable power-of-attorney document often exists long before a relationship with a nursing home is anticipated."); and Pet. App. 44a ("It makes no difference that arbitration clauses are commonplace in nursing home contracts and that a principal might anticipate that someday his agent will act to admit him into one.").

Long-term care providers are entitled to the same equal protection as any contract signator. The Fourteenth Amendment commands persons who are similarly situated must be treated alike. *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Likewise, the Supreme Court of Kentucky affirmed in *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 465 (Ky.

2011), "[c]itizens of Kentucky enjoy equal protection of the law under the 14th Amendment of the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution" (citing *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003)). *Whisman* does not even try to disguise its discrimination against enforcing agent-entered arbitration contracts utilized in long-term care settings.

Amici increasingly find their use of arbitration under siege. The New York Times recently campaigned against use of arbitration agreements in nursing home settings. *See* Editorial, *When People Sign Away Their Right to Sue*, N.Y. TIMES, July 25, 2016 at A22. The Supreme Court of Kentucky, however, should be fulfilling its duty to enforce the laws equally for all citizens, not favoring politically-trending views via unconstitutional decisions. In fact no rational basis or substantial and justifiable reasons exist for treating long-term care facilities differently from other industries that rely on arbitration agreements. *Whisman*'s distinction creates an arbitrary one between similarly situated individuals, and thus violates the equal protection guarantees of the Federal and State Constitutions. *Cf.*, *Gardner*, 364 S.W.3d at 474.

V. STATE COURT RESTRICTIONS ON ARBITRATION RIGHTS POSE A SUBSTANTIAL THREAT TO AN INCREASINGLY IMPORTANT INDUSTRY

The *Whisman* case virtually eliminates use of agent-executed, predispute arbitration agreements in the long-term care industry. Its holding poses a substantial threat to the long-term care industry at a time when demographic trends dictate that the provision of long-term care will become even more important in the near future. As the U.S. population ages, the long-term care industry will play an increasingly prominent role in providing health care to the nation's elderly.[7] Even as efforts to expand independent living options continue, it is undisputed that a strong long-term care industry is essential for the future well-being of the country's aging population.

In addition to undue litigation burdens hindering its ability to enforce its federal arbitration rights, the nation's long-term care industry faces a number of other challenges to threaten it, including economic, governmental, and regulatory pressures. For example,

---

[7] The population age 65 and over has increased from 36.2 million in 2004 to 46.2 million in 2014 (a 28% increase) and is projected to more than double to 98 million in 2060. By 2040, there will be about 82.3 million older persons, twice the number in 2000. People 65+ represented 14.5% of the population in the year 2014 but are expected to grow to 21.7% of the population by 2040. The 85+ population is projected to triple from 6.2 million in 2014 to 14.6 million in 2040. *See* U.S. Dep't of Health & Human Servs., Admin, on Aging, *Aging Statistics*, http://www.aoa.gov/aoaroot/aging_statistics/index.aspx (updated through 2015).

in 2011, the Centers for Medicare & Medicaid Services implemented a rule cutting payments to skilled nursing facilities in the 2012 fiscal year by 11.1 percent, affecting provider reimbursement for post-acute care for seniors who have been hospitalized and require rehabilitative services before returning to their homes.[8] Moreover, skilled nursing facilities are facing a cumulative Medicare funding reduction worth $65 billion over the next ten years.[9]

Efficient dispute resolution in long-term care settings should be encouraged, not discouraged as in *Whisman*. The long-term care industry is often unable to seek legislative protection against this onslaught in states like Kentucky, Illinois, Arkansas, and Georgia, where state constitutional doctrines are used to defeat efforts of all tort reform legislation. *See Bayer CropScience LP v. Schafer*, 2011 Ark. 518, 385 S.W.3d 822 (Ark. 2011); *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 220 (Ga. 2010); *Williams v. Wilson*, 972 S.W.2d 260, 267 (Ky. 1998).

---

[8] Philip Moeller, *Nursing Homes Squeezed by Medicare Cuts*, U.S. News Money (Aug. 8, 2011), http://money.usnews.com/money/blogs/the-best-life/2011/08/08/nursing-homes-squeezed-by-medicare-cuts.

[9] *$65 billion in Medicare cuts to rock U.S. nursing homes over 10 years, analysis shows*, McKnight's Long-Term Care News (Aug. 2, 2012), http://www.mcknights.com/65-billion-in-medicare-cuts-to-rock-us-nursing-homes-over-10-years-analysis-shows/article/253036.

The long-term care industry can contract to arbitrate personal injury claims, just like any others. *Amici* join the Petitioners in asking this Court to grant review.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the judgment below reversed. *Whisman* is enormously detrimental to the long-term care industry, particularly if its reasoning spreads beyond Kentucky to other states.

Respectfully submitted,

DONALD L. MILLER, II
Counsel of Record
KRISTIN M. LOMOND
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
9300 Shelbyville Road, Suite 400
Louisville, KY 40222
(502) 423-6390
dmiller@qpwblaw.com
klomond@qpwblaw.com
Counsel for Amici Curiae

AND
BRIEFS

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

JOINT APPENDIX

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

ROBERT E. SALYER
Counsel of Record
Wilkes & McHugh, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com

Counsel for Respondents

PETITION FOR CERTIORARI FILED JULY 1, 2016
CERTIORARI GRANTED OCTOBER 28, 2016

TABLE OF CONTENTS

Relevant Docket Entries in the Kentucky Court of Appeals (*Clark*) 1

Relevant Docket Entries in the Kentucky Court of Appeals (*Wellner*) 2

Relevant Docket Entries in the Kentucky Supreme Court (*Clark*) 3

Relevant Docket Entries in the Kentucky Supreme Court (*Wellner*) 5

Power of Attorney (*Clark*) 7

Power of Attorney (*Wellner*) 10

Arbitration Agreement (*Clark*) 14

Arbitration Agreement (*Wellner*) 21

Petition for Rehearing (*Clark*) (Appendices Omitted) (October 12, 2015) 28

Petition for Rehearing (*Wellner*) (Appendices Omitted) (October 12, 2015) 44

Response to Petition for Rehearing (*Clark*) (October 23, 2015) 60

Response to Petition for Rehearing (*Wellner*) (October 23, 2015) 72

Appellants' Motion for Leave to Cite Supplemental Authority (*Clark*) (December 16, 2015) 84

The Kentucky Supreme Court's Receipt of Notice of Movants' Motion for Leave to Cite Supplemental Authority (*Clark*) (December 16, 2015) 90

Appellees' Response to Motion to Supplement Authorities in Support of Petitioners' Pending Petition for Rehearing (*Clark*) 92

Appellees' Response to Motion to Supplement Authorities in Support of Petitioners' Pending Petition for Rehearing (*Wellner*) 101

The following items are not reproduced in the joint appendix because they have already been reproduced in the petition for a writ of certiorari, at the pages indicated:

The Kentucky Supreme Court's Order Denying Rehearing (February 18, 2016) 1a

The Kentucky Supreme Court's Opinion (September 24, 2015) 3a

The Kentucky Court of Appeals' Order in *Clark* (June 25, 2013) 119a

The Clark County Circuit Court's November 19, 2012 Order in *Clark* 126a

The Clark County Circuit Court's January 9, 2012 Order in *Clark* 128a

The Kentucky Court of Appeals' Order in *Wellner* (June 25, 2013) 131a

The Clark County Circuit Court's November 19, 2012 Order in *Wellner* 138a

The Clark County Circuit Court's January 9, 2012 Order in *Wellner* 140a

The following items are not reproduced in the joint appendix because they have already been reproduced in the response to petition for a writ of certiorari, at the pages indicated:

Appellants' Motion for Leave to Cite Supplemental Authority in *Wellner* (December 15, 2016) 1a

The Kentucky Supreme Court's Receipt Of Notice of Movants' Motion for Leave to Cite Supplemental Authority in *Wellner* (December 16, 2015) 8a

The Kentucky Supreme Court's Order Granting Movants' Motion to Cite Supplemental Authority (December 30, 2015)..... 10a

KENTUCKY COURT OF APPEALS

KINDRED NURSING CENTERS LIMITED PARTNERSHIP,

Appellant,

v.

JANIS E. CLARK, Executrix of the Estate of Olive G. Clark, deceased,

Appellee.

No. 2012-CA-2113

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	11/19/2012	Circuit Court Judgment
2	12/7/2012	Relief Pursuant to CR 65.07
3	12/7/2012	Motion for Interlocutory Relief
4	12/18/2012	Response to Motion
11	6/25/2013	Order Denying Relief under CR 65
13	9/24/2015	Supreme Court Opinion
15	2/23/2016	Finality

KENTUCKY COURT OF APPEALS

KINDRED NURSING CENTERS LIMITED PARTNERSHIP,

Appellant,

v.

BEVERLY M. WELLNER (individually, and on behalf of the Estate of Joe P. Wellner),

Appellee.

No. 2012-CA-2112

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	11/19/2012	Circuit Court Judgment
2	12/7/2012	Relief Pursuant to CR 65.07
3	12/7/2012	Motion for Interlocutory Relief
4	12/18/2012	Response to Motion
11	6/25/2013	Order Denying Relief under CR 65
13	9/24/2015	Supreme Court Opinion
15	2/23/2016	Finality

SUPREME COURT
OF KENTUCKY

KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A FOUNTAIN CIRCLE HEALTH AND REHABILITATION, et al.,

Appellants,

v.

JANIS E. CLARK, Executrix of the Estate of Olive G. Clark, deceased, and on behalf of the wrongful death beneficiaries of Olive G. Clark,

Appellee.

No. 2013-SC-430

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	6/25/2013	Judgment/Original Action Date
2	7/2/2013	Relief Pursuant to CR 65.09
3	7/10/2013	Partial Record Filed
4	7/15/2013	Respondent's Response
6	7/15/2013	Sent Out for Assignment
10	11/7/2013	Courts Own Motion: Setting Oral Argument

NO.	DATE	DESCRIPTION
11	11/19/2013	Courts Own Motion: Setting Oral Argument
12	6/22/2015	Motion as to Record
13	6/26/2015	Response to Motion as to Record
16	8/4/2015	Order – As to Record
17	9/24/2015	Opinion – Denying
18	10/9/2015	Order on Courts Own Motion
19	10/13/2015	Petition for Rehearing
20	10/26/2015	Response to Petition for Rehearing
21	11/10/2015	Sent Out for Assignment
30	2/18/2016	Order Denying Petition for Rehearing
31	2/18/2016	Finality – Publication Letter
32	2/18/2016	Finality
33	11/4/2016	Note That Certiorari Granted

THE SUPREME COURT
OF KENTUCKY

KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A FOUNTAIN CIRCLE HEALTH AND REHABILITATION, et al.,

Appellants,

v.

BEVERLY WELLNER, individually and on behalf of the Estate of Joe P. Wellner, deceased, and on behalf of the wrongful death beneficiaries of Joe P. Wellner,

Appellee.

No. 2013-SC-431

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	6/25/2013	Judgment/Original Action Date
2	7/2/2013	Relief Pursuant to CR 65.09
3	7/10/2013	Partial Record Filed
4	7/15/2013	Respondent's Response
6	7/15/2013	Sent Out for Assignment
10	11/7/2013	Courts Own Motion: Setting Oral Argument

NO.	DATE	DESCRIPTION
11	11/19/2013	Courts Own Motion: Setting Oral Argument
12	6/22/2015	Motion as to Record
13	6/26/2015	Response to Motion as to Record
16	8/4/2015	Order – As to Record
17	9/24/2015	Opinion – Denying
18	10/9/2015	Order on Courts Own Motion
19	10/13/2015	Petition for Rehearing
20	10/26/2015	Response to Petition for Rehearing
21	11/10/2015	Sent Out for Assignment
30	2/18/2016	Order Denying Petition for Rehearing
31	2/18/2016	Finality – Publication Letter
32	2/18/2016	Finality
33	11/4/2016	Note That Certiorari Granted

GENERAL DURABLE POWER OF ATTORNEY TO CONDUCT ALL BUSINESS AND PERSONAL AFFAIRS OF PRINCIPAL

I, OLIVE G. CLARK, (SSAN # XXX-XX2445), of 536 Garden Springs Drive, Mt. Sterling, KY 40353, hereby constitute and appoint my daughter, JANIS ELAINE CLARK of 825 Sunset Drive, Lexington, Fayette County, Kentucky 40502, my true and lawful attorney in fact, with full power for me and in my name, place, and stead, in her sole discretion, to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way.

Without limiting or derogating from this general power, I specifically authorize my attorney in fact for me and in my name, place, and stead, in her sole discretion:

To prepare and complete administrative documents necessary to secure or preserve any and all governmental benefits available to me;

To lease, sell, or convey any real or personal property that I may now or ever own;

To mortgage my property as she sees fit;

To receive and receipt for any money which may now or hereafter be due to me;

To retain and release all liens on real or personal property;

To draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds or agreements;

To invest or reinvest my money for me;

To institute or defend suits concerning my property or rights;

To file all tax returns (including, without limitation, state and federal income tax returns;

To enter all safe deposit boxes;

To transfer assets of mine to any trust created by me for addition to trust principal; and

Generally to do and perform for me and in my name all that I might do if present.

Also, without limiting or derogating from this general power, I authorize my attorney in fact to make all decisions regarding my health care and medical treatment.

THIS POWER OF ATTORNEY IS A DURABLE POWER OF ATTORNEY AND SHALL NOT BE AFFECTED BY MY DISABILITY AS PRINCIPAL OR OTHERWISE.

The rights, powers, and authority of my attorney in fact shall commence upon execution of this instrument and shall remain in full force and effect until this instrument is terminated by me in writing.

I hereby adopt and ratify all of the acts of my said attorney in fact done pursuant to the power hereby granted, as fully as if I were acting in my own proper person.

IN TESTIMONY WHEREOF, WITNESS my signature this 31st of August, 2006.

/s/
OLIVE G.CLARK

(STATE OF KENTUCKY)
)
(COUNTY OF _____)

Before me, the undersigned authority, came OLIVE G. CLARK, who is of sound mind and eighteen (18) years of age or older, and acknowledged that she voluntarily dated and signed this writing or directed it to be signed and dated as above.

Done this 31st day of August, 2006.

/s/ _____
(Signature of Notary Public)
Date commission expires:
10/9/2007

Prepared by:

/s/ _____
Glenn E. Acree
Acree Law Office
P O Box 25787
Lexington, KY 40583-5787
(859) 253-4664

POWER OF ATTORNEY
OF
JOE PAUL WELLNER

KNOW ALL MEN BY THESE PRESENTS:

That I, **JOE PAUL WELLNER**, of Winchester, Clark County, Kentucky hereby make, constitute and appoint my wife, **BEVERLY M. WELLNER**, as my true and lawful Attorney-in-Fact for me and in my name, place and stead:

1. To receive, take receipt for, and hold in possession, manage and control all property, both real and personal, which I now or may hereafter own, hold, possess or be or become entitled to with full power to sell, mortgage or pledge, assign, transfer, invest and reinvest the same or any part thereof in forms of investment, including bonds, notes and other obligations of the United States deemed prudent by my said wife in her discretion, with full power to retain the same without liability for loss or depreciation thereof.

2. To demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor).

3. To make, execute, deliver and endorse notes, drafts, checks and order for the payment of money or other property from or to me or order in my name.

4. To, make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation

to both real and personal property, including stocks, bonds, and insurance.

5. To have access to my safe deposit boxes, act as my proxy with power of substitution to vote all stocks or securities in my name in relation to any individual or corporate action, to deposit any stocks or securities in connection with any plans of prospective or reorganization committees, to accept and exercise all rights, to subscribe for securities and to sell same.

6. To receive and receipt for all rents and income to which I am or may become entitled, pay therefrom all necessary expenses for the maintenance, upkeep, care and protection of my property, deduct therefrom her own reasonable compensation, and pay the net income from time to time to me or in such manner as I shall direct, or in the absence of such payment to me or at my discretion, to invest the same for me in her judgment in the manner above described.

7. To prepare, execute and file federal or state income tax returns and other real and personal property tax lists and to pay all such taxes.

8. In the event of my illness, incapacity or other emergency to have full power to make all health care decisions for me and in my stead; this power shall encompass the power to make any decision which I might myself make in authorizing or refusing treatment, surgery or other health care. My Attorney-in-Fact shall have the right to refuse the administration of nutrition and hydration.

9. If I should ever need a guardian or curator or similar person or entity to assist me if I am unable to fully handle all of my affairs, and if this Power of Attorney should not be sufficient therefor, I nominate my wife, **BEVERLY M. WELLNER**, as my guardi-

an, curator, etc., and I specifically provide that surety not be required on her bond as such.

10. I hereby further grant unto my Attorney-in-Fact full power in and concerning the above premises and to do any and all acts as set forth above as fully as I could do if I were personally present, and at my decease to pay, transfer and deliver over to my personal representative, all principal and income then in his possession and control, and I do ratify and confirm whatever my said Attorney-in-Fact shall lawfully do under these presents, provided however, that my attorney shall not bind me as surety, guarantor for accommodation nor give away any of my estate, whatsoever, nor shall my attorney be authorized to accept service of process for or on my behalf.

This Power of Attorney shall become effective immediately and shall not be affected by my disability, this provision being pursuant to KRS 386.093.

A photo copy or other mechanical duplication of this instrument shall have the same effect as an original.

I revoke all prior General Powers of Attorney that I may have executed and I retain the right to revoke or amend this Durable Power of Attorney and to execute a new Durable Power of Attorney, assuming that I have the capacity to do so. Any amendments to this Power of Attorney shall be made by me in writing.

IN WITNESS WHEREOF, I have hereunto set my hand and signature on this the 15th day of May, 2008.

WITNESS TO SIGNATURE BY MARK

/s/_____ **JOE PAUL** His /s Mark **WELLNER**

/s/_____

STATE OF KENTUCKY)

) s.s.

COUNTY OF CLARK)

I, a notary public in and for the State and County aforesaid, do hereby certify that the foregoing Power of Attorney was produced and executed before me by **JOE PAUL WELLNER** who is personally known to me, and was acknowledged by him in my presence on this the 15th day of May, 2008 to be his voluntary act and deed.

My commission expires March 31, 2012.

/s/ Ashley B. Holley
NOTARY PUBLIC
STATE OF KENTUCKY AT LARGE

Prepared by:

/s/Michael A. Rowady
MICHAEL A. ROWADY, ESQ.
Blair & Rowady, P.S.C.
212 South Maple Street
Winchester, Kentucky 40391
(859) 744-3251

ALTERNATIVE DISPUTE RESOLUTION AGREEMENT BETWEEN RESIDENT AND FACILITY (OPTIONAL)

I. ALTERNATIVE DISPUTE RESOLUTION (ADR) AGREEMENT PROVISIONS

A. Any and all claims or controversies arising out of or in any way relating to this ADR Agreement ("Agreement") or the Resident's stay at the Facility including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted standards of health care or safety or the Code of Federal Regulations or unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be subdued to alternative dispute resolution as described in this Agreement. Only disputes that would constitute a legally cognizable cause of action in a court of law may be submitted to alternative dispute resolution. The parties to this Agreement understand that the Dispute Resolution Process contains provisions for both mediation and binding arbitration. If the parties are unable to reach settlement informally, or through mediation, the dispute shall proceed to binding arbitration. Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s). Except as

expressly set forth herein, the provisions of the Uniform Arbitration Act, KRS 417.045 et seq., shall govern the Arbitration. This Agreement includes claims against the Facility, its employees and/or its medical director in his capacity as medical director.

B. It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees, servants, officers, directors and any parent or subsidiary of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident. The term "Resident" includes the resident, his or her Guardian or Attorney In Fact, his or her agent(s) or any person whose claim is derived though or on behalf of the resident.

C. The "Claimant" may be either the Facility or the Resident, depending on who files the Request for ADR (the "Request"). The other party or parties against whom the Request is filed will be the "Respondent(s)".

D. Any mediation or arbitration conducted pursuant to this Agreement shall be administered by an independent impartial entity that is regularly engaged in providing mediation and arbitration. services. The Request for ADR shall be made in writing and may be submitted to the National Arbitration Forum ("NAF"), 6465 Wayzata Blvd., Suite 500, P.O. Box 50191, Minneapolis, MN 55405, (800) 474-2371, facsimile (952) 345-1160 www.adrforum.com (the "Administrator"), by regular mail, certified mail, or overnight delivery. If the parties choose not to select NAF or, if NAF is unwilling or unable to serve as the

Administrator, the parties shall select another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator. Requests for ADR, regardless of the entity chosen to be Administrator, shall be conducted in accordance with the NAF Mediation Rules and NAF Code of Procedure (hereinafter, collectively "NAF Rules of Procedure"). A copy of the Rules of the Dispute Resolution Process may be obtained from the Facility's Executive Director, or from NAF at the address or website listed above.

E. All claims based in whole or in part on the same incident(s), transaction(s), or related course of care or services provided by the Facility to the Resident, shall be mediated or arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the Request for ADR and is not presented in the arbitration hearing.

F. The parties shall attempt to resolve any dispute arising out of or relating to the Agreement or the Resident's stay at the Facility by mediation. Unless the parties agree otherwise, the mediator will be selected as described in the NAF Mediation Rules. The mediation shall convene not later than 120 days after the Request is received by the Administrator. Any claim or controversy that remains unresolved after the conclusion or termination of the mediation shall be settled by binding arbitration in accordance with this Agreement. Unless the parties agree otherwise, the Arbitrator(s) shall be selected as described in the NAF Code of Procedure. The arbitration shall convene not later than sixty (60) days after the conclusion or termination of mediation. Claims where the demand is less than $75,000 shall not be subject to mediation and shall proceed directly to ar-

bitration, unless one of the parties requests mediation, in which case all parties shall mediate in good faith. The parties, at their own expense, may be represented by an attorney at the mediation or arbitration.

G. The parties agree to engage in limited discovery of relevant information and documents before and during mediation in accord with the Supplemental Disclosures for Kindred Mediations ("Supplemental Disclosures"). Any disputes which the parties cannot resolve regarding the scope and limits of discovery shall be resolved by the mediator. A copy of the Supplemental Disclosures may be obtained from the Facility's Executive Director or from NAF at the address or website listed in Paragraph D of this Agreement.

H. Cost of ADR. Facility shall pay the mediator's fees and other reasonable costs (excluding resident's attorney's fees) associated with the mediation. Facility shall pay the Arbitrator(s)' fees and other reasonable costs associated with the arbitration (excluding resident's attorney's fees) up to a maximum of five (5) days of hearing. If the arbitration hearing exceeds five (5) days, the additional fees and costs shall be borne equally by the parties.

I. The losing party must pay the award to the prevailing party within thirty (30) days of the award date. If the award is not timely paid, the prevailing party may bring legal action pursuant to KRS 417.150 to enforce the award as if ft were a judgment entered by a court.

J. If for any reason there is a finding that the Uniform Arbitration Act KRS 417.045 et seq., cannot be applied to this Agreement, then the parties here-

by make clear their intent that their disputes/claims be resolved pursuant to the Federal Arbitration Act and that the parties do not want their disputes/claims resolved in a judicial forum.

K. The Parties agree and stipulate that the original of this Agreement, including the signature page, may be scanned and stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown accurately to reproduce the original of this document, may be used for any purpose just as if it were the original, including proof of the content of the original writing.

L. The Resident, or his or her legal guardian, his or her agent or designated legal representative understand that other local nursing home's agreements may not contain an alternative dispute resolution provision. The parties agree that the cost-effectiveness, time-efficiency and public policy reasons stated above are proper consideration for the acceptance of the Agreement.

II. ATTORNEY FEES AND COSTS

The parties to this Agreement expressly agree to bear their own attorney fees and costs incurred in relation to this Agreement, or in relation to any other claim, including a claim to collect on unpaid nursing home charges.

III. SEVERABILITY PROVISION

If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining

provisions, and partially invalid or unenforceable provisions, to the extent valid and enforceable, shall nevertheless be binding and valid and enforceable.

IV. RESIDENT'S UNDERSTANDING OF AGREEMENT

The Resident understands that (A) he/she has the right to seek legal counsel concerning this Agreement, (B) the execution of this Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (C) this Arbitration Agreement may be revoked by providing notice to the Facility from the Resident within thirty (30) days of signature. If not revoked within thirty (30) days, this Agreement shall remain in effect for all care and services rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility. (D) Nothing in this Agreement shall prevent Resident or any other person from reporting alleged violations of law to the appropriate administrative, regulatory or law enforcement agency. The Resident, his or her agent or designated legal representative, also had the opportunity to consult with a Facility representative regarding such explanations or clarification.

Olive Clark	0280 Winchester Centre for Health & Rehabilitation
Print Name of Resident	Print Name and Number of Facility

/s/ Jan Clark POA
Signature of Resident or Legal Representative

/s/
Signature of Title of Facility's Authorized Agent

Jan Clark, Daughter (Financial Agent)
Legal Representative Printed Name and Capacity (i.e., guardian, durable power of attorney, spouse, son, daughter, etc.)

/s/
Printed Name of Facility's Authorized Agent

Date: 8/15/08

Date: 8/15/08

If signed by a Legal Representative, the representative certifies that the Facility may reasonably rely upon the validity and authority of the representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the resident.

ALTERNATIVE DISPUTE RESOLUTION AGREEMENT BETWEEN RESIDENT AND FACILITY (OPTIONAL)

I. ALTERNATIVE DISPUTE RESOLUTION (ADR) AGREEMENT PROVISIONS

A. Any and all claims or controversies arising out of or in any way relating to this ADR Agreement ("Agreement") or the Resident's stay at the Facility including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted standards of health care or safety or the Code of Federal Regulations or unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be subdued to alternative dispute resolution as described in this Agreement. Only disputes that would constitute a legally cognizable cause of action in a court of law may be submitted to alternative dispute resolution. The parties to this Agreement understand that the Dispute Resolution Process contains provisions for both mediation and binding arbitration. If the parties are unable to reach settlement Informally, or through mediation, the dispute shall proceed to binding arbitration. Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s). Except as

expressly set forth herein, the provisions of the Uniform Arbitration Act, KRS 417.045 et seq., shall govern the Arbitration. This Agreement includes claims against the Facility, its employees and/or its medical director in his capacity as medical director.

B. It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees, servants, officers, directors and any parent or subsidiary of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident. The term "Resident" includes the resident, his or her Guardian or Attorney in Fact, his or her agent(s) or any person whose claim is derived through or on behalf of the resident.

C. The "Claimant" may be either the Facility or the Resident, depending on who files the Request for ADR (the "Request"). The other party or parties against whom the Request is filed will be the "Respondent(s)".

D. Any mediation or arbitration conducted pursuant to this Agreement shall be administered by an independent impartial entity that is regularly engaged in providing mediation and arbitration services. The Request for ADR shall be made in writing and may be submitted to the National Arbitration Forum ("NAF"), 6465 Wayzata Blvd., Suite 500, P.O. Box 50191, Minneapolis, MN 55405, (800) 474-2371, facsimile (952) 345-1160 www.adrforum.com (the "Administrator"), by regular mail, certified mail, or overnight delivery. If the parties choose not to select NAF or, if NAF is unwilling or unable to serve as the

Administrator, the parties shall select another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator. Requests for ADR, regardless of the entity chosen to be Administrator, shall be conducted in accordance with the NAF Mediation Rules and NAF Code of Procedure (hereinafter, collectively "NAF Rules of Procedure"). A copy of the Rules of the Dispute Resolution Process may be obtained from the Facility's Executive Director, or from NAF at the address or website listed above.

E. All claims based in whole or in part on the same incident(s), transaction(s), or related course of care or services provided by the Facility to the Resident, shall be mediated or arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the Request for ADR and is not presented in the arbitration hearing.

F. The parties shall attempt to resolve any dispute arising out of or relating to the Agreement or the Resident's stay at the Facility by mediation. Unless the parties agree otherwise, the mediator will be selected as described in the NAF Mediation Rules. The mediation shall convene not later than 120 days after the Request is received by the Administrator. Any claim or controversy that remains unresolved after the conclusion or termination of the mediation shall be settled by binding arbitration in accordance with this Agreement. Unless the parties agree otherwise, the Arbitrator(s) shall be selected as described in the NAF Code of Procedure. The arbitration shall convene not later than sixty (60) days after the conclusion or termination of mediation. Claims where the demand is less than $75,000 shall not be subject to mediation and shall proceed directly to ar-

bitration, unless one of the parties requests mediation, in which case all parties shall mediate in good faith. The parties, at their own expense, may be represented by an attorney at the mediation or arbitration.

G. The parties agree to engage in limited discovery of relevant information and documents before and during mediation in accord with the Supplemental Disclosures for Kindred Mediations ("Supplemental Disclosures"). Any disputes which the parties cannot resolve regarding the scope and limits of discovery shall be resolved by the mediator. A copy of the Supplemental Disclosures may be obtained from the Facility's Executive Director or from NAF at the address or website listed in Paragraph D of this Agreement.

H. Cost of ADR. Facility shall pay the mediator's fees and other reasonable costs (excluding resident's attorney's fees) associated with the mediation. Facility shall pay the Arbitrator(s)' fees and other reasonable costs associated with the arbitration (excluding resident's attorney's fees) up to a maximum of five (5) days of hearing. If the arbitration hearing exceeds five (5) days, the additional fees and costs shall be borne equally by the parties.

I. The losing party must pay the award to the prevailing party within thirty (30) days of the award date. If the award is not timely paid, the prevailing party may bring legal action pursuant to KRS 417.150 to enforce the award as if it were a judgment entered by a court.

J. If for any reason there is a finding that the Uniform Arbitration Act KRS 417.045 et seq., cannot be applied to this Agreement, then the parties here-

by make clear their intent that their disputes/claims be resolved pursuant to the Federal Arbitration Act and that the parties do not want their disputes/claims resolved in a judicial forum.

K. The Parties agree and stipulate that the original of this Agreement, including the signature page, may be scanned and stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown accurately to reproduce the original of this document, may be used for any purpose just as if it were the original, including proof of the content of the original writing.

L. The Resident, or his or her legal guardian, his or her agent or designated legal representative understand that other local nursing home's agreements may not contain an alternative dispute resolution provision. The parties agree that the cost-effectiveness, time- efficiency and public policy reasons stated above are proper consideration for the acceptance of the Agreement.

II. ATTORNEY FEES AND COSTS

The parties to this Agreement expressly agree to bear their own attorney fees and costs incurred in relation to this Agreement, or in relation to any other claim, including a claim to collect on unpaid nursing home charges.

III. SEVERABILITY PROVISION

If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining

provisions, and partially invalid or unenforceable provisions, to the extent valid and enforceable, shall nevertheless be binding and valid and enforceable.

IV. RESIDENTS UNDERSTANDING OF AGREEMENT

The Resident understands that (A) he/she has the right to seek legal counsel concerning this Agreement, (B) the execution of this Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (C) this Arbitration Agreement may be revoked by providing notice to the Facility from the Resident within thirty (30) days of signature. If not revoked within thirty (30) days, this Agreement shall remain in effect for all care and services rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility. (D) Nothing in this Agreement shall prevent Resident or any other person from reporting alleged violations of law to the appropriate administrative, regulatory or law enforcement agency. The Resident, his or her agent or designated legal representative, also had the opportunity to consult with a Facility representative regarding such explanations or clarification.

Joe Wellner	0280 Winchester Centre for Health & Rehabilitation
/s/	
Print Name of Resident	Print Name and Number of Facility

_____	/s/ _____
Signature of Resident or Legal Representative	Signature of Title of Facility's Authorized Agent
Beverly Wellner, Spouse (Financial Agent)	/s/
Legal Representative Printed Name and Capacity (i.e., guardian, durable power of attorney, spouse, son, daughter, etc.)	Printed Name of Facility's Authorized Agent
Date: 8/16/08	Date: 8/16/08

If signed by a Legal Representative, the representative certifies that the Facility may reasonably rely upon the validity and authority of the representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the resident.

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000430-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION

MOVANTS/PETITIONERS

v.

JANIS E. CLARK, Executrix of the Estate of OLIVE G. CLARK, deceased, and on behalf of the wrongful death beneficiaries of OLIVE G. CLARK
RESPONDENT/RESPONDENT

ON REVIEW FROM
COURT OF APPEALS
CASE NO: 2012-CA-002213-I

PETITION FOR REHEARING

Submitted by:
Quintairos, Prito, Wood & Boyer, P.A.

/s/_____
Donald L. Miller, II
Peter Cassidy, III
Kristin M. Lomond

9300 Shelbyville Road, Suite 400
Louisville, KY 40222
COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that ten (10) copies of this brief were served upon Susan Stokley Clary, Clerk, Supreme Court of Kentucky, RM. 209, State Capitol, 700 Capitol Ave., Frankfort, KY 40601-3488, and one (1) copy served on Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Jean Chenault Logue, Circuit Judge, Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; Robert Salyer and Richard E. Circeo, Esq., Wilkes & McHugh, P.A., 429 N. Broadway, P.O. Box 1747, Lexington, KY 40588-1747, and J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 4›..; on this 12th day of October, 2015.

/s/ _____
Counsel for Petitioners

PETITION FOR REHEARING

The majority Opinion sidestepped the Federal Arbitration Act, the Supremacy Clause and misinterpreted controlling decisions of the U.S. Supreme Court. A power of attorney cannot constitutionally permit formation of one type of contract but not an arbitration contract. The Court should correct the majority's error. Civil Rule 76.32 governs petitions for rehearing and states in part, "[A] petition for re-

hearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto."[1]

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States...shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby." U.S. CONST., Art. VI, c1.2. Therefore, a "state law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' is preempted by the Supremacy Clause." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As federal substantive law, the Federal Arbitration Act ("FAA") preempts all contrary or inconsistent state law. See *ATT Mobility, LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011). The majority here agreed the FAA applied to govern the arbitration agreements at issue:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, ...

---

[1] This closely decided (4-3) decision sets new Kentucky precedent, and Petitioners agree with the dissent that it overtly conflicts with federal and state court decisions interpreting and applying the FAA to Kentucky arbitration law. Since oral arguments were held in this case on December 12, 2013, almost two years ago now, even this Court's membership has changed. Petitioners respect the Court's considered debate, and given such a close decision with such huge implications for Kentucky law, encourage the Court strongly to consider rehearing in this case.

> or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract,...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). *See also, Extendicare Homes, Inc. v. Whisman*, No. 2013-SC-000426-I, 2015 WL 5634309 at *8 (Ky. Sept. 24, 2015). Nevertheless, it failed to apply the FAA. The Court's Opinion is attached as Appendix 1.

The majority Opinion's newly-created rule of law disfavoring enforcement of agent-executed arbitration agreements cannot stand in light of the FAA. To require more to enforce an arbitration contract signed by an agent than for any other contract signed by an agent disproportionately impacts arbitration and is preempted by the FAA.

Ms. Clark expressly granted to her attorney-in-fact the power to make and sign "any and all contracts or agreements," without qualification. She also granted her the authority, "in her sole discretion, to transact, handle and dispose of all matters affecting me and/or my estate in any possible way." *See* General Durable Power of Attorney, attached as Appendix 2 (emphasis added). The majority requires for enforcement a redundancy that would require correction in a grammar class. By fiat, the majority vitiates Ms. Clark's express grant of power and deems it to be a "vague and general delegation of authority." See *Whisman*, 2015 WL 563430 at *16. The majority also characterized an arbitration contract – a contract to agree upon the forum for resolution of her claims – as one waiving the "inviolate," "sacred," and "God-given right" to a jury trial. *Id.*

The majority opinion radically misses the mark because it derives from an incorrect assumption concerning the United States' form of government. Whether characterized as a "Constitutional Democracy" where the majority rules, *see Smith v. Allwright,* 321 U.S. 649, 664 (U.S. 1944), or a "Constitutional Republic" where the people are sovereign, *see Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793)(superseded by statute in holding), its founders built the United States as a nation of laws. Indeed, when the majority's members took their places on this Court each took an oath to "*support* the Constitution of the United States and the Constitution of this Commonwealth." Kentucky Constitution § 228 (emphasis added). The majority did not comply with this oath. As Justice Thurgood Marshall stated:

> Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of §2 .... A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Perry v. Thomas, 482 U.S. 483, 492 fn 9 (1987) (*citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984)(emphasis original)).

The majority's Opinion does not support the U.S. or Kentucky Constitutions. A jury trial is absolutely not a "God-given" right, but rather a right provided under the terms and conditions of a constitution written and adopted by its people. In fact, one can easily waive one's right to jury trial simply by not asking for it. *See* CR 38.04. *See also, Brown v. Hoblitzell*, 307 S.W.2d 739 (Ky. 1956). Regardless, the majority probably invalidated countless arbitration contracts signed by agents under powers of attorney for mobile phone service, cable television, credit cards, loans, etc., without even considering *those* ramifications, because it so detests the agreements in the nursing home context.[2] A result-oriented law is not faithful to any constitution.

Highlighting the majority Opinion's error is its failure to recognize – or to distinguish – that courts

---

[2] As the Court is well aware, arbitration clauses appear in a myriad of contracts involving a host of goods and services. *See, e.g., Green Tree Fin. Corp. v.* Baizle, 539 U.S. 444 (2003)(home improvement loan); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (commercial debt restructuring contract); *Circuit City Stores, Inc. v. Adams*, 532 U.S.105 (2001)(employment contract); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (longshoreman collective bargaining contract); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)(securities brokerage contract); *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995)(termite control contract); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)(paint manufacturing and sales agreement). *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, inc. 473 U.S. 614 (1985)(automobile manufacturing and sales distribution contract).

and legislatures can indeed set higher standards for parental rights, slavery and marriage to name a few (*see, e.g.*, KRS 625.090; KY Const. § 25; and KRS 402.050) because no federal law prohibits those elevated standards. The majority simply ignores that the FAA does prohibit higher standards for arbitration contracts as compared to others. The majority's dislike for the federal mandate, "redefining" or "elevating" the standard for enforcing agent-executed arbitration contracts is simply preempted.

I. THE MAJORITY OVERLOOKED AND IGNORED THE FAA AS THE CONTROLLING STATUTE AND MISCONSTRUED CONTROLLING DECISIONS INTERPRETING IT

The Federal Arbitration Act ("FAA") expressly protects both pre-and post-dispute arbitration contracts, including those used in long-term care facilities like the one at issue here. See 9 U.S.C. § 2. *See also, Marmet Health Care Center, Inc. v. Brown*, __ U.S. __, 132 S. Ct. 1201 (2012) (applying the FAA in nursing home context).

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011), the U.S. Supreme Court held that the FAA means exactly what it says: agreements to arbitrate "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*, 131 S.Ct. at 1745 (quoting 9 U.S.C. § 2). Arbitration is a matter of contract and courts must treat arbitration contracts "on an equal footing with other contracts" and enforce them to their terms. *Id.* at 1745. The FAA not only preempts state laws that expressly disfavor arbitration agreements but it also preempts state-law rules that purport to apply to all contracts equally but actually "have a **dispropor-**

tionate impact on arbitration agreements." See *Id.* at 1747 (emphasis added). The majority's Opinion does both, and the FAA preempts its rule of law.

Regardless of the majority's intent, its Opinion discriminates against arbitration contracts, isolating them as forgoing a "God-given" right. That violates the FAA. The FAA preempts all generally applicable contract defenses – as this Court crafted its rule here – that "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746:

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). **But the inquiry becomes more complex when a doctrine normally thought to be generally applicable**, such as duress or, as relevant here, unconscionability, **is alleged to have been applied in a fashion that disfavors arbitration.** In *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), for example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "at law or in equity for the revocation of any contract." *Id.*, at 492, n. 9, 107 S.Ct. 2520 (emphasis deleted).

Concepcion, 131 S.Ct. at 1747 (bold emphasis added).

The majority Opinion found Ms. Clark's POA granted to her agent the authority to enter into the arbitration agreement. That should have ended the discussion. But the majority then took its analysis one step further and held that the arbitration con-

tract *itself* required a higher standard for enforcement than other contracts:

> One might entertain considerable doubt about whether Olive consciously intended to forfeit her right of access to the courts and to a jury trial, but the language of her POA encompasses that result regardless of Olive's actual intent. Given this extremely broad, universal delegation of authority, **it would be impossible to say that entering into a pre-dispute arbitration agreement was not covered.**
>
> ...
>
> Our focus has been, and remains, upon the scope of the powers expressed in the power-of-attorney document, and whether those expressed powers are sufficient to supply the principal's assent **needed to form an agreement, which on its face, forfeits those fundamental constitutional rights.**

Whisman, 2015 WL 5634309 at *14-*15 (emphasis added). The majority's Opinion simply violates the FAA and the Supremacy Clause.

The FAA does not prohibit a person from denying her attorney-in-fact the power to sign arbitration contracts. The principal retains the prerogative to limit an agent's authority under the POA as she sees fit. *See, e.g., Ping v. Beverly Enterprises, Inc.*, 376 S.W. 3d 581, 591-92 (Ky. 2012)("Although the statute allows durable powers of attorney to be created, it does not address what authority may be granted therein. The scope of that authority is thus left to the principal to declare"). However, the FAA abso-

lutely prohibits a court or state legislature from doing what Ms. Clark herself did *not* do: making rules to inhibit enforcement of arbitration contracts signed by her agent, as distinguished from all other contracts signed by her agent. Stated otherwise, the FAA prohibits courts from interpreting a POA providing the "right to contract," or a similar proxy, to authorize the formation of one type of contract but not a contract for arbitration. *See, e.g., GGNSC Vanceburg, LLC v. Taulbee*, 2013 WL 4041174 (E.D.Ky., Aug. 7, 2013) (copy attached as Appendix 3).

Here, the majority refused to enforce a valid arbitration contract by *inferring* that Ms. Clark *might* have limited her attorney-in-fact's express power "to sign any and all contracts" because this particular contract contained an arbitration clause, which by definition waives her right to jury trial. *Whisman*, 2015 WL 5634309 at *14-*15. Kentucky's legislature could not pass a law requiring more specificity in the POA's grant of authority to enforce an arbitration contract than is required for all other contracts and this Court cannot craft one. That law flagrantly offends the FAA. Yet, the majority held agent-executed arbitration contracts in Kentucky shall require more for enforcement than all other agent-executed contracts. *Id.* at *17. *Compare, Taulbee, supra.*[3]

---

[3] "An arbitration agreement is a contract. The power of attorney must be read in accordance with its express terms and in light of the strong federal policy favoring arbitration.... Taulbee's arguments that arbitration agreements are different and require more than the general power to contract for authorization to execute one are of no help to her. That line of reasoning would

II. THE MAJORITY OPINION MISAPPLIED THE APPLICABLE LAW

Congress enacted the FAA "in response to widespread judicial hostility to arbitration agreements" that had "manifested itself in a 'great variety' of 'devices and formulas' declaring arbitration against public policy." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745, 1747 (2011)(quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). Here, the majority attempted to avoid U.S. Supreme Court precedent by characterizing its rule as one of general agency law and denying any specific arbitration discrimination:

> We reject the notion that this holding conflicts with the decisions of the United States Supreme Court in *Marmet Health Care Center, Inc. v. Brown*, - U.S. - , 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012), and *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).... To the contrary, our holding does not prohibit arbitration of any "particular type of claim." .... A straight-forward application of our rule that an attorney-in-fact cannot act beyond the powers granted in the power-of-attorney document stands in stark contrast to the blanket prohibitions against arbitration agreements condemned in *Marmet* and *Concepcion*. Whatever hostility our rule evinces is not against the federal policy favoring arbitration; indeed, Kentucky shares that same policy, as we have proclaimed on several occa-

---

simply result in preemption of such a requirement under the FAA." 2013 WL 4041174 at *9 (emphasis added).

> sions. Our rule merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights regardless of the context in which they arise.

Whisman, 2015 WL 5634309 at *17-*18 (footnote omitted).

The majority apparently misreads or misconceives *Concepcion's* and *Marmet Health's* holdings. While *Concepcion* held that prohibiting a particular claim violated the FAA, it also held that "a doctrine normally thought to be generally applicable" can violate the FAA if applied in a fashion to disfavor arbitration. *See Concepcion*, 131 S. Ct. at 1747. This Court previously rejected a similar attempted distinction in a commercial context, in *Schnuerle v. Insight Commc'ns Co.*, L.P., 376 S.W.3d 561, 577 (Ky. 2012):

> [O]ur state Constitution and statutes favor the enforceability of arbitration agreements. Moreover, the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, [citation omitted] (1991). The FAA's provisions "manifest a liberal federal policy favoring arbitration agreements.' " *Id.* at 25, 111 S.Ct. 1647 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, [citation omitted] (1983)). The Supreme Court has

> "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90, [citation omitted] (2000) (quoting *Rodriguez de Quijas v. Shearson/AM. Express, Inc.*, 490 U.S. 477, 481 [citation omitted] (1989)); *Jenkins*, 400 F.3d at 874. In light of such long-standing public policy, we see no basis to disturb this contractual term. (Emphasis added.)

The majority ignored its own precedent because of the context of this arbitration agreement. Commercial contract cases often invoke the right to jury trial just like a medical negligence case.

Holding the express power to "make and sign any and all contracts," Ms. Clark's attorney-in-fact could have (most likely, did) enter into enforceable contracts for a variety of reasons, such as for banking rights, property purchases, or even to admit her mother to a hospital. Nevertheless, the majority held that the contract she signed to arbitrate her mother's claims – a choice of forum contract with absolutely no substantive implications to her right to seek redress for claims – cannot be enforced because the POA document did not include ***redundant*** language to sign an "***arbitration contract,***" or even, "to waive her constitutional right to jury trial."[4]

---

[4] The dissent explained the error in this comparison logic: "The difference between arbitration and the majority's parade of horribles is obvious. Unlike the majority's examples, all of which suppose the waiver or compromise of a basic, personal

"The 'principal purpose' of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1748 (*citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). While the §2 savings clause preserves applicable common law contract defenses, the *Concepcion* Court warned that the grounds available under §2 must not be construed to include a state's policy preference for procedures incompatible with arbitration. "[N]othing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. 1740, 1748 (citations omitted).

Federal law requires the Court to "stretch" to find ways to enforce arbitration contracts. The majority reclassified "arbitration contracts" not as mere contracts but as a principal's "waiver of his constitutional right to access the courts and to trial by jury." See *Whisman*, 2015 WL 5634309, at *17. The result mandates discriminatory enforcement for agent-entered arbitration contracts as compared with all other agent-entered contracts: an agent's power "to

substantive right (rights that an ordinary attorney-in-fact is rarely, if ever, asked to address on the principal's behalf), arbitration agreements, which are commonplace these days, involve no substantive waiver. The principal's substantive rights remain intact, only the forum for addressing those rights is affected. The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive substantive rights) is the very presumption Congress sought to counteract with the FAA. *Southland Corp. v. Keating*, 465 U.S. at 14, 104 S. Ct. 852 (discussing Congress's intent to counteract "common law hostility toward arbitration")." *Extendicare Homes, Inc. v. Whisman*, No. 2013-SC-000426-I, 2015 WL 5634309, at *35 (Ky. Sept. 24, 2015).

sign contracts" is now insufficient to enter into arbitration contracts, rendering arbitration contracts - alone – unenforceable absent additional language not required for enforcement of all other agent-entered contracts. That result is preempted by the FAA. [5]

[5] The FAA also preempts Kentucky's interpretation of an arbitration agreement's enforceability as against wrongful death claim beneficiaries. In *Marmet Health Care Center*, 565 U.S. __, 132 S.Ct. 1201, 1202-03 (2012), the U.S. Supreme Court held that the FAA preempted categorical exemptions of cases from arbitration. No legitimate distinction exists between West Virginia's "policy-based" law prohibiting enforcement of predispute agreements to arbitrate wrongful death claims and Kentucky's judicially made "contract-based" law prohibiting enforcement of predispute agreements to arbitrate wrongful death claims. Several cases await decisions on petitions for discretionary review, conclusively demonstrating the constitutional impermissibility of allowing many (perhaps all) contracts affecting beneficiaries or other non-parties to the contract – but isolating arbitration agreements as an outcast.

III. CONCLUSION

Here the Court has no choice but to grant rehearing and correct its plain error.

Respectfully submitted,

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

/s/_____
Donald L. Miller, II, Esq.
J. Peter Cassidy, III, Esq.
Kristin M. Lomond, Esq.
9300 Shelbyville Road, Suite 400
Louisville, Kentucky 40222
Telephone: (502) 423-6390
Facsimile: (502) 423-6391
Counsel for Petitioners

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION
MOVANTS/PETITIONERS

v.

BEVERLY WELLNER, Individually and on behalf of the Estate of JOE P. WELLNER, deceased, and on behalf of the wrongful death beneficiaries of JOE P. WELLNER
RESPONDENT/RESPONDENT

ON REVIEW FROM
COURT OF APPEALS
CASE NO: 2012-CA-002212-I

PETITION FOR REHEARING

Submitted by:

Quintairos, Prieto, Wood & Boyer,P.A.

/s/

J. Peter Cassidy, III
Kristin M. Lomond
9300 Shelbyville Road, Suite 400
Louisville, KY 40222
COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that ten (10) copies of this brief were served upon Susan Stoldey Clary, Clerk, Supreme Court of Kentucky, Rm. 209, State Capitol, 700 Capitol Ave., Frankfort, KY 40601-3488, and one (1) copy served on Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Jean Chenault Logue, Circuit Judge, Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; Robert Salyer and Richard E. Circeo, Esq., Wilkes & McHugh, P.A., 429 N. Broadway, P.O. Box 1747, Lexington, KY 40588-1747, and J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 40475 on this 12th day of October, 2015.

/s/
Counsel For Petitioners

PETITION FOR REHEARING

The majority Opinion sidestepped the Federal Arbitration Act, the Supremacy Clause and misinterpreted controlling decisions of the U.S. Supreme Court. A power of attorney cannot constitutionally permit formation of one type of contract but not an

arbitration contract. The Court should correct the majority's error. Civil Rule 76.32 governs petitions for rehearing and states in part, "[A] petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto."[1]

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States...shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby." U.S. CONST., Art. VI, c1.2. Therefore, a "state law that 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' is preempted by the Supremacy Clause." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As federal substantive law, the Federal Arbitration Act ("FAA") preempts all contrary or inconsistent state law. *See ATT Mobility, LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011). The majority here agreed the FAA applied to govern the arbitration agreements at issue:

---

[1] This closely decided (4-3) decision sets new Kentucky precedent, and Petitioners agree with the dissent that it overtly conflicts with federal and state court decisions interpreting and applying the FAA to Kentucky arbitration law. Since oral arguments were held in this case on December 12, 2013, almost two years ago now, even this Court's membership has changed. Petitioners respect the Court's considered debate, and given such a close decision with such huge implications for Kentucky law, encourage the Court strongly to consider rehearing in this case.

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract,... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). *See also, Extendicare Homes, Inc. v. Whisman*, No. 2013-SC-000426-I, 2015 WL 5634309 at *8 (Ky. Sept. 24, 2015). Nevertheless, it failed to apply the FAA. The Court's Opinion is attached as Appendix 1.

The majority Opinion's newly-created rule of law disfavoring enforcement of agent-executed arbitration agreements cannot stand in light of the FAA. To require more to enforce an arbitration contract signed by an agent than for any other contract signed by an agent disproportionately impacts arbitration and is preempted by the FAA.

Mr. Wellner expressly granted to his attorney-in-fact the power to make, execute and deliver "contracts of every nature in relation to both real and personal property," without qualification. *See* Power of Attorney of Joe Paul Wellner, attached as Appx. 2. The Court agreed that personal injury claims constitute "personal property" under Kentucky law. *See Whisman*, 2015 WL 563430 at *13. The majority then characterized the arbitration contract — a contract to agree on a forum for resolving his personal injury claims – as a contract not relating to personal property (e.g., where to resolve the claims) but, instead, "to relinquish his constitutional rights," which

are "decisively *not* 'personal property.'" *Id.* (emphasis original). By fiat, the majority vitiates Mr. Wellner's express grant of power and removes "arbitration contracts" from the genre of all other contracts relating to Mr. Wellner's personal property. *Id.* Moreover, following the majority's logic, his attorney-in-fact could unilaterally release Mr. Wellner's personal injury claim but could not choose to litigate that claim in an arbitral forum.

The majority opinion radically misses the mark because it derives from an incorrect assumption concerning the United States' form of government. Whether characterized as a "Constitutional Democracy" where the majority rules, *see Smith v. Alfright*, 321 U.S. 649, 664 (U.S. 1944), or a "Constitutional Republic" where the people are sovereign, *see Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)(superseded by statute in holding), its founders built the United States as a nation of laws. Indeed, when the majority's members took their places on this Court each took an oath to "*support* the Constitution of the United States and the Constitution of this Commonwealth." Kentucky Constitution § 228 (emphasis added). The majority did not comply with this oath. As Justice Thurgood Marshall stated:

> Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of §2 .... A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe

> that agreement in a mariner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Perry v. Thomas, 482 U.S. 483, 492 fn 9 (1987) (*citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984)(emphasis original)).

The majority's Opinion does not support the U.S. or Kentucky Constitutions. A jury trial is absolutely not a "God-given" right, but rather a right provided under the terms and conditions of a constitution written and adopted by its people. In fact, one can easily waive one's right to jury trial simply by not asking for it. *See* CR 38.04. *See also*, *Brown v. Hobitzell*, 307 SW2d 739 (Ky. 1956). Regardless, the majority probably invalidated countless arbitration contracts signed by agents under powers of attorney for mobile phone service, cable television, credit cards, loans, etc., without even considering *those* ramifications, because it so detests the agreements in the nursing home context.[2] A result-oriented law is not faithful to any constitution.

---

[2] As the Court is well aware, arbitration clauses appear in a myriad of contracts involving a host of goods and services. *See, e.g., Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)(home improvement loan); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (commercial debt restructuring contract); *Circuit City Stores, Inc. v. Adams*, 532 U.S.105 (2001)(employment con-

Highlighting the majority Opinion's error is its failure to recognize – or to distinguish – that courts and legislatures can indeed set higher standards for parental rights, slavery and marriage to name a few (*see, e.g.*, KRS 625.090; KY Const. § 25; and KRS 402.050) because no federal law prohibits those elevated standards. The majority simply ignores that the FAA does prohibit higher standards for arbitration contracts as compared to others. The majority's dislike for the federal mandate, "redefining" or "elevating" the standard for enforcing agent-executed arbitration contracts is simply preempted.

I. THE MAJORITY OVERLOOKED AND IGNORED THE FAA AS THE CONTROLLING STATUTE AND MISCONSTRUED CONTROLLING DECISIONS INTERPRETING IT

The Federal Arbitration Act ("FAA") expressly protects both pre-and post-dispute arbitration contracts, including those used in long-term care facilities like the one at issue here. *See* 9 U.S.C. § 2. *See also, Marmet Health Care Center, Inc. v. Brown*, ___ U.S. ___, 132 S.Ct. 1201 (2012) (applying the FAA in nursing home context).

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011), the U.S. Supreme Court held that the FAA means exactly what it says:

---

tract); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (longshoreman collective bargaining contract); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)(securities brokerage contract); *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995)(termite control contract); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)(paint manufacturing and sales agreement). *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, inc. 473 U.S. 614 (1985)(automobile manufacturing and sales distribution contract).

agreements to arbitrate "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*, 131 S.Ct. at 1745 (quoting 9 U.S.C. § 2). Arbitration is a matter of contract and courts must treat arbitration contracts "on an equal footing with other contracts" and enforce them to their terms. Id. at 1745. The FAA not only preempts state laws that expressly disfavor arbitration agreements but it also preempts state-law rules that purport to apply to all contracts equally but actually "have a **disproportionate impact** on arbitration agreements." *See id.* at 1747 (emphasis added). The majority's Opinion does both, and the FAA preempts its rule of law.

Regardless of the majority's intent, its Opinion discriminates against arbitration contracts, isolating them as forgoing a "God-given" right. That violates the FAA. The FAA preempts all generally applicable contract defenses – as this Court crafted its rule here -- that "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746:

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). **But the inquiry becomes more complex when a doctrine normally thought to be generally applicable**, such as duress or, as relevant here, unconscionability, **is alleged to have been applied in a fashion that disfavors arbitration**. In *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), for example, we noted that the FAA's preemptive

> effect might extend even to grounds traditionally thought to exist " 'at law or in equity for the revocation of any contract.' " *Id.*, at 492, n. 9, 107 S.Ct. 2520 (emphasis deleted).

Concepcion, 131 S.Ct. at 1747 (bold emphasis added).

The majority found Mr. Wellner's personal injury claim constituted personal property, and his attorney-in-fact had the authority to make contracts relating to his personal property. *See Whisman*, 2015 WL 5634309 at *13. In other words, Ms. Wellner could make contracts to release his personal injury claims. The arbitration contract concerns the forum to resolve Mr. Wellner's claims, nothing more substantive. But the majority then took its analysis one step further and held that the arbitration contract itself required a higher standard for <u>enforcement</u> than other contracts:

> Beverly's authority to deal with Joe's real and personal property does not translate into the power to relinquish his constitutional rights. Consequently, we conclude that Beverly was not authorized to provide Joe's assent to an agreement waiving his constitutional rights ***by committing his future personal injury claims to arbitration.***

Whisman, 2015 WL 5634309 at *13 (emphasis added). The majority's Opinion simply violates the FAA and the Supremacy Clause.

The FAA does not prohibit a person from denying his attorney-in-fact the power to sign arbitration contracts. The principal retains the prerogative to limit an agent's authority under the POA as he sees fit. *See, e.g., Ping v. Beverly Enterprises, Inc.*, 376 S.W. 3d 581, 591-92 (Ky. 2012)("Although the statute al-

lows durable powers of attorney to be created, it does not address what authority may be granted therein. The scope of that authority is thus left to the principal to declare"). However, the FAA absolutely prohibits a court or state legislature from doing what Mr. Wellner himself did not do: making rules to inhibit enforcement of arbitration contracts signed by his agent, as distinguished from all other "contracts of every nature relating to personal property" signed by his agent. Stated otherwise, the FAA prohibits courts from interpreting a POA providing the "right to contract," or a similar proxy, to authorize the formation of one type of contract but not a contract for arbitration. *See, e.g., GGNSC Vanceburg, LLC v. Taulbee*, 2013 WL 4041174 (E.D.Ky., Aug. 7, 2013) (copy attached as Appendix 3).

Here, the majority refused to enforce a valid arbitration contract. Even though Mr. Wellner expressly granted his attorney-in-fact the power "to sign contracts of every nature in relation to personal property," this particular contract contained an arbitration clause – which by the majority's new definition transformed a choice of forum contract (for resolving his personal injury claims) into a contract waiving constitutional rights. *Whisman*, 2015 WL 5634309 at *13. Kentucky's legislature could not pass a law requiring more specificity in the POA's grant of authority to enforce an arbitration contract than is required for all other contracts and this Court cannot craft one. That law flagrantly offends the FAA. Yet, the majority held agent-executed arbitration contracts in Kentucky shall require more for

enforcement than all other agent-executed contracts. *Id.* at *17. *Compare, Taulbee, supra.*[3]

II. THE MAJORITY OPINION MISAPPLIED THE APPLICABLE LAW

Congress enacted the FAA "in response to widespread judicial hostility to arbitration agreements" that had "manifested itself in a 'great variety' of 'devices and formulas' declaring arbitration against public policy." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745, 1747 (2011)(quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 217 F.2d 402, 406 (2d Cir. 1959)). Here, the majority attempted to avoid U.S. Supreme Court precedent by characterizing its rule as one of general agency law and denying any specific arbitration discrimination:

> We reject the notion that this holding conflicts with the decisions of the United States Supreme Court in *Marmet Health Care Center, Inc. v. Brown*, - U.S. - , 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012), and *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).... To the contrary, our holding does not prohibit arbitration of any "particular type of claim." ....
> A straight-forward application of our rule that an attorney-in-fact cannot act beyond

---

[3] "An arbitration agreement is a contract. The power of attorney must be read in accordance with its express terms and in light of the strong federal policy favoring arbitration.... Taulbee's arguments that arbitration agreements are different and require more than the general power to contract for authorization to execute one are of no help to her. That line of reasoning would simply result in preemption of such a requirement under the FAA." 2013 WL 4041174 at *9 (emphasis added).

> the powers granted in the power-of-attorney document stands in stark contrast to the blanket prohibitions against arbitration agreements condemned in *Marmet* and *Concepcion*. Whatever hostility our rule evinces is not against the federal policy favoring arbitration; indeed, Kentucky shares that same policy, as we have proclaimed on several occasions. Our rule merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights regardless of the context in which they arise.

Whisman, 2015 WL 5634309 at *17-*18 (footnote omitted).

The majority apparently misreads or misconceives *Concepcion's* and *Marmet Health's* holdings. While Concepcion held that prohibiting a particular claim violated the FAA, it also held that "a doctrine normally thought to be generally applicable" can violate the FAA if applied in a fashion to disfavor arbitration. *See Concepcion*, 131 S. Ct. at 1747. This Court previously rejected a similar attempted distinction in a commercial context, in *Schnuerle v. Insight Commc'ns Co., LP.*, 376 S.W.3d 561, 577 (Ky. 2012):

> [O]ur state Constitution and statutes favor the enforceability of arbitration agreements. Moreover, the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other

> contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, [citation omitted] (1991). The FAA's provisions "manifest a liberal federal policy favoring arbitration agreements.' " *Id.* at 25, 111 S.Ct. 1647 (quoting *Moses H Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, [citation omitted] (1983)). **The Supreme Court has "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.' "** *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90, [citation omitted] (2000) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 [citation omitted] (1989)); *Jenkins*, 400 F.3d at 874. In light of such longstanding public policy, we see no basis to disturb this contractual term. (Emphasis added.)

The majority ignored its own precedent because of the context of this arbitration agreement. Commercial contract cases often invoke the right to jury trial just like a medical negligence case.

Holding the express power to "make contracts of every nature in relation to personal property," Mr. Wellner's attorney-in-fact could have (most likely, did) enter into enforceable contracts for a variety of reasons, such as for banking, purchases, or even to admit her husband to a hospital. Nevertheless, the majority held that the contract she signed to arbitrate her husband's claims – a choice of forum contract with absolutely no substantive implications to his right to seek redress for claims – cannot be en-

forced because the POA document did not include ***redundant*** language to sign an "***arbitration*** contract," or even, "to waive his constitutional right to jury trial."[4]

"The 'principal purpose' of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1748 (citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). While the §2 savings clause preserves applicable common law contract defenses, the *Concepcion* Court warned that the grounds available under §2 must not be construed to include a state's policy preference for procedures incompatible with arbitration. "'Nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. 1740, 1748 (citations omitted).

---

[4] The dissent explained the error in this comparison logic: "The difference between arbitration and the majority's parade of horribles is obvious. Unlike the majority's examples, all of which suppose the waiver or compromise of a basic, personal substantive right (rights that an ordinary attorney-in-fact is rarely, if ever, asked to address on the principal's behalf), arbitration agreements, which are commonplace these days, involve no substantive waiver. The principal's substantive rights remain intact, only the forum for addressing those rights is affected. The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive substantive rights) is the very presumption Congress sought to counteract with the FAA. *Southland Corp. v. Keating*, 465 U.S. at 14, 104 S.Ct. 852 (discussing Congress's intent to counteract "common law hostility toward arbitration")." *Extendicare Homes, Inc. v. Whisman*, No. 2013-SC-000426-I, 2015 WL 5634309, at *35 (Ky. Sept. 24, 2015).

Federal law requires the Court to "stretch" to find ways to enforce arbitration contracts. The majority reclassified "arbitration contracts" not as mere contracts but as a principal's "waiver of his constitutional right to access the courts and to trial by jury." *See Whisman*, 2015 WL 5634309, at *17. The result mandates discriminatory enforcement for agent-entered arbitration contracts as compared with all other agent-entered contracts: an agent's power "to sign contracts" is now insufficient to enter into arbitration contracts, rendering arbitration contracts — alone -- unenforceable absent additional language not required for enforcement of all other agent-entered contracts. That result is preempted by the FAA.[5]

III. CONCLUSION

Here the Court has no choice but to grant rehearing and correct its plain error.

Respectfully submitted,

---

[5] The FAA also preempts Kentucky's interpretation of an arbitration agreement's enforceability as against wrongful death claim beneficiaries. In *Marmet Health Care Center*, 565 U.S. __, 132 S.Ct. 1201, 1202-03 (2012), the U.S. Supreme Court held that the FAA preempted categorical exemptions of cases from arbitration. No legitimate distinction exists between West Virginia's "policy-based" law prohibiting enforcement of predispute agreements to arbitrate wrongful death claims and Kentucky's judicially made "contract-based" law prohibiting enforcement of predispute agreements to arbitrate wrongful death claims. Several cases await decisions on petitions for discretionary review, conclusively demonstrating the constitutional impermissibility of allowing many (perhaps all) contracts affecting beneficiaries or other non-parties to the contract – but isolating arbitration agreements as an outcast.

QUINTAIROS ETO, WOOD & BOYER, P.A.
/s/
Donald L. Miller, II, Esq.
J. Peter Cassidy, III, Esq.
Kristin M. Lomond, Esq.
9300 Shelbyville Road, Suite 400
Louisville, Kentucky 40222
Telephone: (502) 423-6390
Facsimile: (502) 423-6391
Counsel for Petitioners

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000430-1

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH & REHABILITATION
PETITIONERS

v.

JANIS E. CLARK, Executrix Of The Estate Of OLIVE G. CLARK, deceased, and on behalf of the wrongful death beneficiaries of OLIVE G. CLARK, deceased
RESPONDENT

RESPONSE TO PETITION FOR REHEARING

Submitted By:

/s/

Richard E. Circeo (KY Bar # 91996)
Robert E. Salyer (KY Bar # 91869)
WILKES & MCHUGH, P.A.
P.O, Box 1747
Lexington, KY 40588-1747
Telephone Number: (859) 455-3356
Facsimile Number: (859) 455-3362
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that this petition was served upon Donald L. Miller, II, Esq.; J. Peter Cassidy, III, Esq.; Kristin M. Lomond, Esq.; Quintairos, Prieto, Wood & Boyer, P.A.; 9300 Shelbyville Road, Suite 400; Louisville, KY 40222; Hon. Jean Chenault Logue, Circuit Judge, Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 40475; and upon the Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this the 23rd day of October, 2015.

/s/
Counsel for Respondent

RESPONSE

The material and procedural facts, controlling law, and jurisdictional basis have not changed. This response to petition is filed pursuant to CR 76.32, which provides in part:

(1) When authorized.

***

(b) Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appea' and will be granted only when it appears that the court has overlooked a ***material fact*** in the record, or a ***controlling statute or decision***, or has ***misconceived the issues presented*** on the appeal or the law applicable thereto.

***

I. Petitioners Do Not Offer A Sufficient Justification For Rehearing.

Petitioners provide this Court with no basis upon which to justify a rehearing. The facts were not in dispute in this case. There have been no facts arising since the Opinion issued to affect its conclusions. Neither the parties nor the Court overlooked either a controlling decision or statute. The Supreme Court's analyses of the issues, including the analyses of the Dissents, were lengthy. Petitioners go on to argue in effect however, that this Court "has misconceived the issues presented on appeal or the law applicable thereto." Not so. Whether or not the Court's Opinion is correct (and it is), the Court certainly perceived all the issues squarely. A rehearing is not authorized in this instance under the Rule.

Petitioners obviously wish to re-argue to this Court, that the Court "got it wrong." Again, ***even if*** this represented a correct characterization—***and it does not***—such a proposition is not a legitimate basis upon which to hold a rehearing. Notwithstanding Petitioners' apparent dissatisfaction with the Opinion of this Court, this Court issued an exhaustive Opinion, in terms of both the Majority and Dissenting opinions, and, as such, it can be fairly said that the Court left no stone unturned in reaching its final result. And the decision was in fact correct.

II. The Supreme Court's Decision Correctly Interpreted Kentucky Agency And Power-Of-Attorney Law.

Whisman clarifies the law regarding Kentucky powers-of-attorney as they relate to pre dispute arbitration agreements entered into between parties. It extends interpretation of Kentucky's law from *Donna*

Ping v. Beverly Enterprises, Inc., 376 SW3d 581 (Ky. 2012), and sets out three teachings:

First, general power-of-attorney language purporting to grant agency authority to transact any and all business that a principal could do if in person, *i.e.*, a generic ***proxy*** power, is, by itself, ineffective to alter a fundamental right of the principal under Kentucky law, *e.g.*, promising forever to forego all litigation in civil courts, of future disputes, between a principal and an outside party. *See Pine Tree Villa, LLC v. Brooker*, 612 FedAppx 340, 344 (6th Cir. 2015) ("Kentucky law does not appear to provide for unlimited POAs."). That is, the latter transactions alter the principal's status in society, at least with respect to the other party to the agreement. These transactions would thus not normatively be foreseeable by the principal, and would not be seen to be encompassed by a general grant of authority without the appropriate specific language going thereto.

Second, the ***act*** of signing a pre-dispute arbitration agreement is qualitatively different from the act of instituting or participating in an arbitration, or of ordinary actions tending to property. A reviewing court must seek out the language for signing the agreement.

Third, the power to enter into the status-altering pre-dispute agreement to arbitrate all disputes between an outside party and a principal is not immanent in specific power-of-attorney ***language*** purporting to grant agency authority (1) over litigation; or (2) over contracts involving a principal's property. Tending to these matters does not cover the alteration of the principal's civil right to a jury

trial vis-à-vis disputes with a second party, potentially in perpetuity.

Just as important decisions which could be expressed in a power-of-attorney, *e.g.*, the ability to marry by proxy, or to cede parental rights, must have that authority set out; an agent waiving his principal's trial rights generally with respect to another party must be set out. *Whisman* could not be more clear regarding vague, general, "big tent" language in a power-of-attorney. It is insufficient to execute the agreement at bar. This is so because the power to modify the fundamental rights of a principal changes that principal's standing in society, *i.e.*, it affects the principal's status. It permanently alters the principal's access to the "King's justice," with respect to at least the other party to the arbitration agreement,[1] and cannot be inferred from an instrument without explicit address.

Given its enormity, mere creation of a power over the principal's legal affairs, to include litigation and the authority to file a law suit on behalf of the principal, is not sufficient. Many powers-of-attorney include language authorizing litigation. However, it does not follow from this that ***granting power to take a certain action*** intrinsically encompasses ***the power to promise never to take that action***. Disavowal (on the principal's behalf), potentially into perpetuity, by an agent of a power given him by the principal would constitute the agent stepping into the shoes of the principal in the ***creation*** of the agency, *i.e.*, unilaterally rewriting the power-of-attorney.

---

[1] Including successors, assigns, affiliates, officers, employees, etc....

Creation of a power to execute contracts in relation to the principal's property is likewise not sufficient. This Court agreed that ***a law suit involving a dispute*** is a species of property, a "chose-in-action." However, the *gravamen* of the arbitration agreement acts not in relation to that property; the agreement acts primarily in relation to a fundamental civil right, vis-à-vis a second party.

It is sometimes pointed out that trial rights are easily waived, by the mere failure not to invoke them. But the dissimilarity here should be obvious. For an agent to transact with respect to, or disavow, a particular piece of property should obviously be small potatoes in a well-equipped power-of-attorney. For an agent to disavow the institution of property altogether, however, is entirely another matter.

II. The Court's Opinion Does Not Impinge Upon The FAA.

The U.S. Supreme Court, interpreting the FAA, has rejected numerous attempts by States to refuse to enforce arbitration contracts undoubtedly made, by virtue of their essential nature or their terms. That is not happening here.

The former point notwithstanding, the U.S. Supreme Court has never held that the FAA requires State agency law to bend to find authority to make such contracts where it otherwise would not be found. As U.S. Supreme Court Justice Clarence Thomas noted in his concurrence in *Concepcion*, *see infra*, "the FAA requires that an agreement to arbitrate be enforced ***unless*** a party successfully challenges the ***formation*** of the arbitration agreement." *AT&T Mobility, LLC v. Concepcion*, 131 SCt 1740, 1753 (2011). This identifies ***where*** the FAA begins

to apply. It intervenes once an arbitration agreement is formed pursuant to unbiased State law principles of interpretation (including those pertaining to authority), and not before. Where the FAA does not begin to apply, the States are unbounded except by their own self-governance... a self-governance that has a place for State judicial interpretation of State law.[2]

"A power of attorney cannot constitutionally permit formation of one type of contract but not an

---

[2] Petitioners bring this Court's attention to *Chisholm v. Georgia*, 2 U.S. 419 (1793), but misread the case. In *Chisholm*, the U.S. Supreme Court denied that States possessed sovereign immunity (Justice Iredell dissenting), holding that all sovereignty was held by the people of the United States as an aggregate of sovereign individuals. It is commonly understood that the peoples of the United States clarified this error via the Eleventh Amendment (1795). Today, Dual Sovereignty is the accepted understanding of the American federal system. *See e.g., Burt v. Titlow*, 134 S.Ct. 10, 15 (2013); *see also* The Kentucky Resolution (1799); *Ware v. Hylton*, 3 US 199 (1796):

"In June 1776, the Convention of Virginia formally declared, that Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States, in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, etc. I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, etc. but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth."

Ware, 3 US at 224 (Opinion of Justice Chase). Finite authority is granted to the federal government through the U.S. Constitution and the laws promulgated therefrom; all other residual governing authority is retained by the States. U.S. Const. amend. X.

arbitration contract." (Petition at p. 1) The error in this statement should be obvious. Of course it can. To put it clearly and methodically: ***Courts*** have no right to discriminate against arbitration. ***Principals*** however, ***have every right to discriminate*** against arbitration.

Happily, Petitioners recognize their error later in their briefing. (*See id.* at p.6) Evidence of discrimination by the principal, as with all discriminations, may arise affirmatively, or by omission. This Court has simply announced what language signifies an omission as a matter of law. ***The power must be affirmatively set out, or it is omitted.*** This is the crux of the issue at bar.

> It would be strange, indeed, if we were to infer, for example, that an attorney-in-fact with the authority "to do and perform for me in my name all that I might if present to make any contracts or agreements that I might make if present" could enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude. It would, of course, be absurd to infer such audacious powers from a non-specific, general, even universal, grant of authority. So too, it would be absurd to infer from a non-specific, universal grant, the principal's assent to surrender of other fundamental, even sacred, liberties.

The Dissent calls the comparative list in the quotation *supra*, a "parade of horribles."

> The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive substantive rights) is the very presumption Congress sought to counteract with the FAA.

By lumping in arbitration with the "parade of horribles," the Dissent believes the Majority shows animus toward arbitration. Respectfully, this is not necessarily so. The list is not really a "parade of horribles." In many instances the decisions listed in the parade may actually be highly beneficial to the principal under the circumstances, *e.g.*, marrying by proxy. *See State v. Anderson*, 396 P2d 558, 561 (Ore. 1964) ("There is nothing about a proxy marriage, that appears to be contrary to public policy."). The decision to marry, by proxy or otherwise, is not a "horrible" one. It is however, a ***monumental decision***, in effect altering the principal's status in society.[3] If the agent might make the decision to execute a marriage is ***foreseen*** by the principal, surely the principal would make this authority clear in any power-of-attorney instrument. If not set out, the courts will deem it to be omitted. This is not discrimination or animus.[4]

---

[3] But unlike the arbitration contract at bar, it is possible to break marital contract and obtain a civil divorce.

[4] It goes without saying that the U.S. Supreme Court considers "marriage" a right, a good, and something to be favoured. *See Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

Petitioners deny the significance of the decision to waive trial rights generally vis-à-vis a party, even potentially in perpetuity. (See Petition at p.3)[5] By implication, Petitioners suggest that courts should treat all decisions by agents with complete indifference; yet the document from whence this Court derives its authority and jurisdiction—the Kentucky Constitution—calls the subject matter here "sacred." Certainly the Commonwealth and its people, as well as the United States, could alter the trial rights belonging to the people. However, the alteration ought not to be effected lightly, as its pedigree reaches back at least to the Magna Carta, wherein King John first conceded that property rights' disputes must remain in the permanent county courts, rather than follow the movable King's Bench.

It is easy enough to distinguish between the will of God and the will of the English barons, but it *is* difficult not to see the hand of Providence shepherding the resolution of disputes in Anglo-American law from the Medieval trial by combat, to the appeal to the Kings' Bench, finally to the right to a civil trial in front of one's peers. Whereas due process in the criminal law is the modus wherein the citizens' relationship with the state mainly subsists, the civil law is the modus wherein the citizens' legal relationships with each other subsists. Petitioners' protestations notwithstanding, civil trial rights are important, and fundamental. More to the point, how agency law

---

[5] It is not appropriate for Respondent to comment on Petitioners' charged language on page 3 of the Petition. Suffice to say that Petitioners' institutional commentary comes off as overheated and unfortunate.

treats such rights does not in any way impact upon the FAA.

This Court in this case has not acted against arbitration. Rather, the Court has acted to specify rules in written agency. More precisely, it has engaged in the interpretation of words on a piece of paper, seeking to determine the intentions of a principal, from what is reasonably foreseeable.

Petitioners recite a litany of false analogies in their petition, one of which demonstrates their misconstruction of the issue at bar: "Kentucky's legislature could not pass a law requiring more specificity in the POA's grant of authority to enforce an arbitration contract than is required for all other contracts and this Court cannot craft one." (Petition at p.7) This is a straw man. Again, the Court here in effect issued a canon of ***interpretation*** of language in an instrument, in the endeavor to divine the intentions of the principal. If the Kentucky legislature were to pass the aforesaid statute, presumably it would be issuing a ***proscription***. The Supreme Court here has issued no proscription.[6]

> Nursing home facilities may still enforce arbitration agreements with their residents

---

[6] Whether the aforesaid proscription—limiting the circumstances under which a power of attorney may execute an arbitration agreement—would be federally pre-empted is not a question in front of this Court. If, to take a different perspective, the legislature attempted to "interpret" principal intentions statutorily, *i.e.*, not place a wicket in front of creating the agency power, but rather, claim to legislatively determine a principal's intent; such would probably constitute an invasion of the judiciary's sphere and a violation of the principle of the separation of powers. This has not occurred, and Petitioners' point is entirely irrelevant and, again, not in front of the bar.

when the resident has signed the agreement or ***validly authorized*** his agent to sign in his stead. (emphasis added)

CONCLUSION

Complaint was filed in this case years ago. Respondent prays this Court deny rehearing.

Respectfully submitted,

/s/_____
Robert E. Salyer, Esq.

SUPREME COURT OF KENTUCKY
2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH & REHABILITATION, *et al.*
PETITIONERS

v.

BEVERLY WELLNER, individually and on behalf of the estate of JOE P. WELLNER, deceased, and on behalf of the wrongful death beneficiaries of JOE P. WELLNER, deceased
RESPONDENT

RESPONSE TO PETITION FOR REHEARING

Submitted By:

/s/ Robert E. Salyer
Richard E. Circeo (KY Bar# 91996)
Robert E. Salyer (KY Bar# 91859)
WILKES & MCHUGH, P.A.
P.O. Box 1747
Lexington, KY 40588-1747
Telephone Number: (859) 455-3356
Facsimile Number: (859) 455-3362
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that this petition was served upon Donald L. Miller, II, Esq.; J. Peter Cassidy, III, Esq.; Kristin M. Lomond, Esq.; Quintairos, Prieto, Wood & Boyer, P.A.; 9300 Shelbyville Road, Suite 400; Louisville, KY 40222; Hon. Jean Chenault Logue, Circuit Judge,

Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 40475; and upon the Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this the 23rd day of October, 2015.

/s/ Robert E. Salyer
Counsel for Respondent

RESPONSE

The material and procedural facts, controlling law, and jurisdictional basis have not changed. This response to petition is filed pursuant to CR 76.32, which provides in part:

> **(1) When authorized.**
>
> ***
>
> (b) Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the court has overlooked a ***material fact*** in the record, or a ***controlling statute or decision***, or has ***misconceived the issues presented*** on the appeal or the law applicable thereto.
>
> ****

I. Petitioners do not offer a sufficient justification for rehearing.

Petitioners provide this Court with no basis upon which to justify a rehearing. The facts were not in dispute in this case. There have been no facts arising

since the Opinion issued to affect its conclusions. Neither the parties nor the Court overlooked either a controlling decision or statute. The Supreme Court's analyses of the issues, including the analyses of the Dissents, were lengthy. Petitioners go on to argue in effect however, that this Court "has misconceived the issues presented on appeal or the law applicable thereto." Not so. Whether or not the Court's Opinion is correct (and it is), the Court certainly perceived all the issues squarely. A rehearing is not authorized in this instance under the Rule.

Petitioners obviously wish to re-argue to this Court, that the Court "got it wrong." Again, ***even if*** this represented a correct characterization – ***and it does not*** – such a proposition is not a legitimate basis upon which to hold a rehearing. Notwithstanding Petitioners' apparent dissatisfaction with the Opinion of this Court, this Court issued an exhaustive Opinion, in terms of both the Majority and Dissenting opinions, and, as such, it can be fairly said that the Court left no stone unturned in reaching its final result. And the decision was in fact correct.

II. The Supreme Court's decision correctly interpreted Kentucky agency and power-of-attorney law.

Whisman clarifies the law regarding Kentucky powers-of-attorney as they relate to pre- dispute arbitration agreements entered into between parties. It extends interpretation of Kentucky's law from *Donna Ping v. Beverly Enterprises, Inc.*, 376 SW3d 581 (Ky. 2012), and sets out three teachings:

First, general power-of-attorney language purporting to grant agency authority to transact any and all business that a principal could do if in per-

son, i.e., a generic proxy power, is, by itself, ineffective to alter a fundamental right of the principal under Kentucky law, *e.g.*, promising forever to forego all litigation in civil courts, of future disputes, between a principal and an outside party. *See Pine Tree Villa, LLC v. Brooker*, 612 FedAppx 340, 344 (6th Cir. 2015) ("Kentucky law does not appear to provide for unlimited POAs."). That is, the latter transactions alter the principal's status in society, at least with respect to the other party to the agreement. These transactions would thus not normatively be foreseeable by the principal, and would not be seen to be encompassed by a general grant of authority without the appropriate specific language going thereto.

Second, the ***act*** of signing a pre-dispute arbitration agreement is qualitatively different from the act of instituting or participating in an arbitration, or of ordinary actions tending to property. A reviewing court must seek out the language for signing the agreement.

Third, the power to enter into the status-altering pre-dispute agreement to arbitrate all disputes between an outside party and a principal is not immanent in specific power-of-attorney ***language*** purporting to grant agency authority (1) over litigation; or (2) over contracts involving a principal's property. Tending to these matters does not cover the alteration of the principal's civil right to a jury trial vis-a-vis disputes with a second party, potentially in perpetuity.

Just as important decisions which could be expressed in a power-of-attorney, *e.g.*, the ability to marry by proxy, or to cede parental rights, must have that authority set out; an agent waiving his

principal's trial rights generally with respect to another party must be set out. *Whisman* could not be more clear regarding vague, general, "big tent" language in a power-of- attorney. It is insufficient to execute the agreement at bar. This is so because the power to modify the fundamental rights of a principal changes that principal's standing in society, *i.e.*, it affects the principal's status. It permanently alters the principal's access to the "King's justice," with respect to at least the other party to the arbitration agreement,[1] and cannot be inferred from an instrument without explicit address.

Given its enormity, mere creation of a power over the principal's legal affairs, to include litigation and the authority to file a law suit on behalf of the principal, is not sufficient. Many powers-of-attorney include language authorizing litigation. However, it does not follow from this that ***granting power to take a certain action*** intrinsically encompasses ***the power to promise never to take that action***. Disavowal (on the principal's behalf), potentially into perpetuity, by an agent of a power given him by the principal would constitute the agent stepping into the shoes of the principal in the **creation** of the agency, *i.e.*, unilaterally rewriting the power-of-attorney.

Creation of a power to execute contracts in relation to the principal's property is likewise not sufficient. This Court agreed that ***a law suit involving a dispute*** is a species of property, a "chose-in-action." However, the gravamen of the arbitration agreement acts not in relation to that property; the

---

[1] Including successors, assigns, affiliates, officers, employees, etc....

agreement acts primarily in relation to a fundamental civil right, vis-à-vis a second party.

It is sometimes pointed out that trial rights are easily waived, by the mere failure not to invoke them. But the dissimilarity here should be obvious. For an agent to transact with respect to, or disavow, a particular piece of property should obviously be small potatoes in a well- equipped power-of-attorney. For an agent to disavow the institution of property altogether, however, is entirely another matter.

II. The Court's Opinion does not impinge upon the FAA.

The U.S. Supreme Court, interpreting the FAA, has rejected numerous attempts by States to refuse to enforce arbitration contracts undoubtedly made, by virtue of their essential nature or their terms. That is not happening here.

The former point notwithstanding, the U.S. Supreme Court has never held that the FAA requires State agency law to bend to find authority to make such contracts where it otherwise would not be found. As U.S. Supreme Court Justice Clarence Thomas noted in his concurrence in *Concepcion*, *see infra*, "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the ***formation*** of the arbitration agreement." *AT&T Mobility, LLC v. Concepcion*, 131 SCt 1740, 1753 (2011). This identifies ***where*** the FAA begins to apply. It intervenes once an arbitration agreement is formed pursuant to unbiased State law principles of interpretation (including those pertaining to authority), and not before. Where the FAA does not begin to apply, the States are unbounded except by their own

self-governance... a self- governance that has a place for State judicial interpretation of State law.[2]

"A power of attorney cannot constitutionally permit formation of one type of contract but not an arbitration contract." (Petition at p. 1) The error in this statement should be obvious. Of course it can. To put it clearly and methodically: Courts have no right to discriminate against arbitration. ***Principals*** however, ***have every right to discriminate*** against arbitration.

---

[2] Petitioners bring this Court's attention to *Chisholm v. Georgia*, 2 U.S. 419 (1793), but misread the case. In *Chisholm*, the U.S. Supreme Court denied that States possessed sovereign immunity (Justice Iredell dissenting), holding that all sovereignty was held by the people of the United States as an aggregate of sovereign individuals. It is commonly understood that the peoples of the United States clarified this error via the Eleventh Amendment (1795). Today, Dual Sovereignty is the accepted understanding of the American federal system. *See e.g., Burt v. Titlow*, 134 S.Ct. 10, 15 (2013); *see also* The Kentucky Resolution (1799); *Ware v. Hylton*, 3 US 199 (1796):

"In June 1776, the Convention of Virginia formally declared, that Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States, in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, etc. I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, etc. but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth."

Ware, 3 US at 224 (Opinion of Justice Chase). Finite authority is granted to the federal government through the U.S. Constitution and the laws promulgated therefrom; all other residual governing authority is retained by the States. U.S. Const. amend. X.

Happily, Petitioners recognize their error later in their briefing. (*See id.* at p.6) Evidence of discrimination by the principal, as with all discriminations, may arise affirmatively, or by omission. This Court has simply announced what language signifies an omission as a matter of law. ***The power must be affirmatively set out, or it is omitted.*** This is the crux of the issue at bar.

> It would be strange, indeed, if we were to infer, for example, that an attorney-in-fact with the authority "to do and perform for me in my name all that I might if present to make any contracts or agreements that I might make if present" could enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude. It would, of course, be absurd to infer such audacious powers from a non-specific; general, even universal, grant of authority. So too, it would be absurd to infer from a non-specific, universal grant, the principal's assent to surrender of other fundamental, even sacred, liberties.

The Dissent calls the comparative list in the quotation *supra*, a "parade of horribles."

> The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive sub-

stantive rights) is the very presumption Congress sought to counteract with the FAA.

By lumping in arbitration with the "parade of horribles," the Dissent believes the Majority shows animus toward arbitration. Respectfully, this is not necessarily so. The list is not really a "parade of horribles." In many instances the decisions listed in the parade may actually be highly beneficial to the principal under the circumstances, *e.g.*, marrying by proxy. *See State v. Anderson*, 396 P2d 558, 561 (Ore. 1964) ("There is nothing about a proxy marriage that appears to be contrary to public policy."). The decision to marry, by proxy or otherwise, is not a "horrible" one. It is however, a ***monumental decision***, in effect altering the principal's status in society.[3] If the agent might make the decision to execute a marriage is ***foreseen*** by the principal, surely the principal would make this authority clear in any power-of-attorney instrument. If not set out, the courts will deem it to be omitted. This is not discrimination or animus.[4]

Petitioners deny the significance of the decision to waive trial rights generally vis-a-vis a party, even potentially in perpetuity. (*See* Petition at p.3)[5] By implication, Petitioners suggest that courts should

---

[3] But unlike the arbitration contract at bar, it is possible to break marital contract and obtain a civil divorce.

[4] It goes without saying that the U.S. Supreme Court considers "marriage" a right, a good, and something to be favoured. *See Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

[5] It is not appropriate for Respondent to comment on Petitioners' charged language on page 3 of the Petition. Suffice to say that Petitioners ' institutional commentary comes off as overheated and unfortunate.

treat all decisions by agents with complete indifference; yet the document from whence this Court derives its authority and jurisdiction – the Kentucky Constitution – calls the subject matter here "sacred." Certainly the Commonwealth and its people, as well as the United States, could alter the trial rights belonging to the people. However, the alteration ought not to be effected lightly, as its pedigree reaches back at least to the Magna Carta, wherein King John first conceded that property rights' disputes must remain in the permanent county courts, rather than follow the movable King's Bench.

It is easy enough to distinguish between the will of God and the will of the English barons, but it *is* difficult not to see the hand of Providence shepherding the resolution of disputes in Anglo-American law from the Medieval trial by combat, to the appeal to the Kings' Bench, finally to the right to a civil trial in front of one's peers. Whereas due process in the criminal law is the modus wherein the citizens' relationship with the state mainly subsists, the civil law is the modus wherein the citizens' legal relationships with each other subsists. Petitioners' protestations notwithstanding, civil trial rights are important, and fundamental. More to the point, how agency law treats such rights does not in any way impact upon the FAA.

This Court in this case has not acted against arbitration. Rather, the Court has acted to specify rules in written agency. More precisely, it has engaged in the interpretation of words on a piece of paper, seeking to determine the intentions of a principal, from what is reasonably foreseeable.

Petitioners recite a litany of false analogies in their petition, one of which demonstrates their mis-

construction of the issue at bar: "Kentucky's legislature could not pass a law requiring more specificity in the POA's grant of authority to enforce an arbitration contract than is required for all other contracts and this Court cannot craft one." (Petition at p.7) This is a straw man. Again, the Court here in effect issued a canon of ***interpretation*** of language in an instrument, in the endeavor to divine the intentions of the principal. If the Kentucky legislature were to pass the aforesaid statute, presumably it would be issuing a ***proscription***. The Supreme Court here has issued no proscription.[6]

> Nursing home facilities may still enforce arbitration agreements with their residents when the resident has signed the agreement or ***validly authorized*** his agent to sign in his stead. (emphasis added)

CONCLUSION

Complaint was filed in this case years ago. Respondent prays this Court deny rehearing.

Respectfully submitted,

/s/ Robert E. Salyer

---

[6] Whether the aforesaid proscription – limiting the circumstances under which a power of attorney may execute an arbitration agreement – would be federally pre-empted is not a question in front of this Court. If, to take a different perspective, the legislature attempted to "interpret" principal intentions statutorily, *i.e.*, not place a wicket in front of creating the agency power, but rather, claim to legislatively determine a principal's intent; such would probably constitute an invasion of the judiciary's sphere and a violation of the principle of the separation of powers. This has not occurred, and Petitioners' point is entirely irrelevant and, again, not in front of the bar.

Robert E. Salyer, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that ten (10) copies of this brief were served upon Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Rm. 209, State Capitol, 700 Capitol Ave., Frankfort, KY 40601-3488, and one (1) copy served on Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Jean Chenault Logue, Circuit Judge, Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; Robert Salyer and Richard E. Circeo, Esq., Wilkes & McHugh, P.A., 429 N. Broadway, P.O. Box 1747, Lexington, KY 40588-1747, and J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 40475 on this 15th day of December, 2015.

/s/_____
Counsel for Movants

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000430-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. D/B/A PEOPLEFIRST REHABILITATION
MOVANTS/PETITIONERS

v.

JANIS E. CLARK, Executrix of the Estate of OLIVE G. CLARK, deceased, and on behalf of the wrongful death beneficiaries of OLIVE G. CLARK
RESPONDENT/RESPONDENT

ON REVIEW FROM
COURT OF APPEALS
CASE NO: 2012-CA-002213-I

MOVANTS' MOTION FOR LEAVE TO CITE SUPPLEMENTAL AUTHORITY

Movants/Petitioners, Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; Kindred Healthcare Operating, Inc. and Kindred Rehab Services, Inc. d/b/a Peoplefirst Rehabilitation, respectfully move for leave to cite supplemental authority, specifically the

recent United States Supreme Court Opinion, rendered December 14, 2015, for consideration by this Court in the Petition for Rehearing:

DIRECTV, Inc. v. Imburgia, __ U.S. __, __ S. Ct. __ (2015), 2015 WL 8546242 (Dec. 14, 2015) (copy attached).

DIRECTV involved the California Court of Appeal's refusal to enforce an arbitration agreement pursuant to its interpretation of state law. The California Court phrased the issue as, "Does the law of California make the contract's class-arbitration waiver unenforceable?" *DIRECTV*, 2015 WL 8546242 at *3. California law previously held that class-arbitration waivers in consumer contracts were unenforceable as unconscionable. *Id.* at *3. However, in 2011, the U.S. Supreme Court held that same California rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in the Federal Arbitration Act. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). Regardless, the California court in *DIRECTV* concluded *Concepcion* did not change the result, that class-arbitration waivers are still unenforceable "under California law." *DIRECTV*, 2015 WL 8546242 at *3. Thus, the Court of Appeal refused to enforce the arbitration contract. *Id.*

The *DIRECTV* Court reversed, stating:

> Lower court judges are certainly free to note their disagreement with a decision of this Court. But the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior

> authority of its source. [Citations omitted]. The Federal Arbitration Act is the law of the United States, and Concepcion is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it. U.S. Const., Art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States").

DIRECTV, 2015 WL 8546242 at *5.

The *DIRECTV* Court summarized its focus, "we must decide not whether ... [the state court's] decision is a correct statement of California law **but whether (assuming it is) that state law is consistent with the Federal Arbitration Act.**" *Id.* at *5 (emphasis added). Recognizing that state courts are "the ultimate authority on that [state] law," (*id.* at *5), the *DIRECTV* Court nevertheless explained its duty to "decide whether the decision of the California court places arbitration contracts 'on equal footing with all other contracts.'" *Id.* at *6 (*citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)):

> And in doing so, **we must examine whether the Court of Appeal's decision in fact rests upon "grounds as exist at law or in equity for the revocation of any contract."** 9 U.S.C. § 2. That is to say, we look not to grounds that the California court might have offered but rather to those it did in fact offer.

DIRECTV, 2015 WL 8546242 at *6 (emphasis added).

The California court's interpretation of the arbitration contract was "unique, restricted to that [arbitration] field." *Id.* at * 6. *DIRECTV* cautioned state courts against such holdings that apply or interpret state law specific to arbitration contracts:

> Third, nothing in the Court of Appeal's reasoning suggests that a California court would reach the same interpretation of "law of your state" **in any context other than arbitration**.... Even given our assumption that the Court of Appeal's conclusion is correct, **its conclusion appears to reflect the subject matter at issue here (arbitration), rather than a general principle that would apply to contracts** using similar language but involving state statutes invalidated by other federal law.
>
> Fourth, **the language used by the Court of Appeal focused only on arbitration**.

See DIRECTV, 2015 WL 8546242 at *6-*7 (emphasis added).

DIRECTV's reasoning may be instructive in this Petition for Rehearing. This Court evaluated the powers granted by the Clark, Whisman and Wellner POAs, specifically evaluating whether those POAs granted authority sufficient for an arbitration contract — which this Court differentiated from all other contracts[1], as containing an additional "waiver of a fundamental constitutional right" to jury trial:

---

[1] "Infusing the authority to enter into 'any contract or agreement' with the authority to waive fundamental constitutional rights eviscerates our long line of carefully crafted jurispru-

> Our focus has been, and remains, upon the scope of the powers expressed in the power-of-attorney document, and whether those expressed powers are sufficient to supply the principal's assent **needed to form an agreement, which on its face, forfeits those fundamental constitutional rights.**

Id. at * 15 (emphasis added).

This Court focused on whether powers expressly granted by a POA document provided sufficient authority specifically in the context of enforcing an arbitration contract. Even after finding the Clark POA granted sufficient authority to sign a contract, (see id. at * 14), the Court narrowly focused on the underlying contract's arbitral nature: "we also consider the extent to which the authority of an agent to waive his principal's fundamental constitutional rights to access the courts, to trial by jury, and to appeal to a higher court, can be inferred from a less-than-explicit grant of authority"). *Id.* at *15. *DIRECTV* holds this reasoning is preempted by the FAA. *See DIRECTV*, 2015 WL 8546242 at *8.

Because the California court's holding did not place arbitration contracts "on equal footing with all other contracts,"... and did not "give due regard ... to the federal policy favoring arbitration," (citations omitted), the Supreme Court held that the FAA preempted the Court of Appeal's decision and ruled that the state court must enforce the arbitration

---

dence dictating that the principal's explicit grant of authority delineated in the power-of-attorney document is the controlling factor in assessing the scope of the powers of the attorney-in-fact." 2015 WL 5634309 at *16.

agreement. *See DIRECTV*, 2015 WL 8546242 at *8 (*citing Perry v. Thomas*, 482 U.S. 483, 493, n. 9 (1987)(noting that the FAA preempts decisions that take their "meaning precisely from the fact that a contract to arbitrate is at issue"),

The analysis employed by the U.S. Supreme Court in *DIRECTV* applies to this case and may be instructive to this Court in ruling on the Petition for Rehearing. Movants cite *DIRECTV* for this reason.

A copy of the opinion is attached for the Court's ready reference.

Respectfully submitted,

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

/s/

Donald L. Miller, II, Esq.
J. Peter Cassidy, III, Esq.
Kristin M. Lomond, Esq.
9300 Shelbyville Road, Suite 400
Louisville, Kentucky 40222
Telephone: (502) 423-6390
Facsimile: (502) 423-6391
Counsel for Movants,
Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; and Kindred Healthcare Operating, Inc.

Office of the Clerk
SUPREME COURT OF KENTUCKY
ROOM 209, STATE CAPITOL
700 CAPITAL AVE.
FRANKFORT, KENTUCKY 40601-348
SUSAN STOKLEY CLARY
Clerk
Telephone: (502) 564-4720
Fax: (502) 564-5491

RECEIPT NOTICE

TO: DONALD LEE MILLER II
FROM: SUSAN STOKLEY CLARY, CLERK
DATE: 12/16/2015

FILE NUMBER: 2013—SC-000430—I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A

APPELLANTS

V.

JANIS E. CLARK, EXECUTRIX OF THE ESTATE OF OLIVE G. CLARK, APPELLEES DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH

APPELLEES

THE DOCUMENT LISTED BELOW HAS BEEN RECEIVED AND FILED IN THIS OFFICE TODAY IN THE ABOVE CASE:

MOVANTS FILED MOTION FOR LEAVE TO CITE SUPPEMENTAL AUTHORITY.

CC: JAMES T. GILBERT
JAMES PETER CASSIDY III
ROBERT EARL SALYER
FILE COPY
KRISTIN M. LOMOND
RICHARD ERIC CIRCEO

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2013 -SC-000430

Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation, *et al.*
MOVANTS/DEFENDANTS

v.

Janis E. Clark, as Executrix on behalf of the Estate of Olive G. Clark, deceased, and on behalf of the wrongful death beneficiaries of Olive G. Clark
RESPONDENTS/PLAINTIFFS

On Appeal from the Kentucky Court of Appeals
2012-CA-002213
Clark County Circuit Court
Civil Action No. 10-CI-00469

RESPONSE TO MOTION TO SUPPLEMENT AUTHORITIES IN SUPPORT OF PETITIONERS' PENDING PETITION FOR REHEARING

Respondents oppose the motion to supplement. The U.S. Supreme Court decision which Petitioners seek to supplement as authority, *DIRECTV, Inc. v. Imburgia*, ____ U.S. ____ S. Ct. ____ 2015 WL 8546242 (2015), has no bearing upon the petition for rehearing. The motion, like the underlying petition for rehearing, should be denied.

RESPONSE

DIRECTV, Inc. v. Imburgia, does not change or add to the law pertinent to the case at bar. As that Opinion itself maintains, *DIRECTV* in effect simply restates the law from *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), regarding enforcing arbitration agreements per their terms.

Moreover, Petitioners are profoundly misinterpreting just what this Court was doing in the consolidated case of *Extendicare Homes, Inc. v. Belinda Whisman; Kindred Nursing Centers LP v. Janis Clark; and Kindred Nursing Centers LP v. Beverly Wellner*, 2015 WL 5634309 ---SW3d---- (Ky. 2015) (hereinafter "*Whisman*"). Petitioners continue to maintain that the Federal Arbitration Act (FAA), 9 USC § 2, pre-empts *Whisman's* result. Now they wish to cite to *DIRECTV* in the matter to that effect.

In fact the FAA is not triggered by the *Whisman* decision. Petitioners' confusion lies in comprehending exactly the nature of *Whisman's* analysis. Self-evidently, this Court did not announce ***a proscription*** against executing any kind of arbitration contract, i.e., that arbitration contracts, validly-made, would not be enforced according to their terms or under certain circumstances. As no one doubts, parties have an unencumbered right to enter into arbitration agreements in Kentucky. Rather, the *Whisman* Court ***engaged in an interpretation of a personal legal writing and grant of authority***, i.e., a power-of-attorney executed by a private party.

I. As the Kentucky Supreme Court is the final interpreter of the General Assembly's statutes, so too is the Kentucky Supreme Court the final interpreter of the power-of-attorney.

To use an analogy, while the Kentucky General Assembly may not prevent anyone from executing an arbitration agreement, it certainly ***could*** discriminate against arbitration in effect ***by declining to create authority*** to execute arbitration contracts in a Kentucky statutory scheme setting up a statutory agent (*e.g.*, a guardian in a State guardianship scheme). And the U.S. Supreme Court has time and again made clear that State statutory interpretation of what a State legislature has created, *i.e.*, the proper interpretation of that State's own laws, is binding upon all courts, as the definitive ***interpretation***.[1] "There is no doubt that we are bound by a state court's construction of a state statute." *Wisconsin v. Mitchell*, 508 US 476, 483 (1993) *(citing R.A.V. v. St. Paul*, 505 US 377, 381 (1992); *New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). Whereas the question of whether a State legislation is (U.S.) Constitutional or not, may fall upon the U.S. Supreme Court, ***interpreting what the State legislation means***, is entirely a State judicial function.

This same principle applies to interpreting the principal's meaning in a power-of-attorney. *See U.S. v. Bussey*, 452 FSupp 891, 895 (D.C.La. 1978) ("[W]e can find no authority which holds that federal law

---

[1] Logically, if the State Supreme Court erred in interpreting a State statute, it would be up to that's State's legislature to correct the high court's error.

governs the interpretation or effect of a power of attorney."); *see also J.F. Toner & Son, Inc. v. Farm Credit Bank of Baltimore*, 1992 WL 404372 (W.D.Va.) ("[T]he interpretation, issuance and use of a power of attorney is governed entirely by state law."). And even Petitioners have conceded that, while the courts may not discriminate against arbitration, principals surely can. And who is the final decision-maker in what a principal has done, in a controversy at bar?

This Court.

A power-of-attorney is in some sense the creation of "personal law," whereby a principal (analogous to the legislature empowering a statutory agent) is legally empowering the principal's agent to act on the principal's behalf. The Kentucky Supreme Court has engaged in ***interpretation***; it has not engaged in a ***proscription*** of arbitration, and thus the FAA is not implicated.

II. *DIRECTV v. Imburgia* is a case pertaining to interpreting and construing a contract, and when to revoke that contract;[2] it is not a case pertaining to interpreting an instrument of agency authority.

In *DIRECTV v. Imburgia*, the media corporation defendant provided a form contract to its California consumers which included a conditional arbitration clause. This arbitration clause included language prohibiting class action arbitration. However, the (pre-*Concepcion*) clause also provided that "if the

---

[2] To provide the context and lineage behind the *DIRECTV* decision, in 2011 *AT&T v. Concepcion* struck down California's law restricting class action waivers in arbitration agreements.

'law of your state,' makes the waiver of class arbitration unenforceable, then the entire [arbitration] provision 'is unenforceable.'"[3] *See DIRECTV* at *3. Bizarrely, the California courts held that this provision incorporated pre-*Concepcion* (and invalid) California consumer law prohibiting class waivers in consumer arbitration into the *DIRECTV* contract, meaning that the arbitration clause as a whole was nullified by its own operation.

The U.S. Supreme Court reversed, keeping in mind the words of 9 USC § 2 (emphasis added):

> A written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract... shall be valid, irrevocable, and enforceable, save upon such grounds ***as*** exist at law or in equity ***for the revocation of any contract***.

California does not routinely import defunct, invalid law into contracts, just in order to dismantle those contracts. Given that the evinced intent of the contracting *DIRECTV* parties was to enter into an arbitration agreement, and given that this intention would be satisfied by the importation of valid post-*Concepcion* California law, and could only be upset by the importation of obsolete, pre-empted, pre-*Concepcion* law; normative contract construction would opt for the former. A court would only opt for

---

[3] That is, it appears that the company preferred bilateral arbitration; but, if forced to face a class action, then it would opt for in-court litigation.

the latter if it sought ***to revoke*** the agreement because of its subject matter.

Finding the existence of an agreement was never the problem. An agreement had undoubtedly been entered into in *DIRECTV*. The *DIRECTV* question arose in the context of construing that agreement, and what to enforce in that construction. And it involved contract revocation.

Not the case here. The question here pertains to the package of powers given by a principal to the agent in a written instrument, and does not pertain whatsoever, despite what Petitioners wish to believe, to revoking a contract or construing its terms.

And so the ultimate question must be this: What institution is the ultimate authority on the meaning of a power-of-attorney, executed and used in a particular State, and involving that States' citizens as principal and agent? The obvious answer is, again: That State's Supreme Court. The FAA does not signal any intention of Congress that State courts (or federal courts for that matter) interpret State agency law in such a manner that they would not otherwise do, were the FAA not to exist. Indeed, Respondent has searched and found no instance where State agency law has been commandeered to advance a federal statutory right, however much such a right is favoured.[4]

---

[4] Absurd and inconsistent results would arise if the American judiciary routinely interpreted State agency law contingent upon the existence of a federal statute to which a litigant had creatively tied a question of authority. Rather, a power-of-attorney is an objective statement of authority.

CONCLUSION

Petitioners have made amply clear their dissatisfaction with *Whisman*. It is time to move on.

Whisman, in its essence, is a case about interpreting a written grant of authority, the power-of-attorney—not contract interpretation or construction—and thus *DIRECTV* has no application. Certainly *DIRECTV* announces nothing constituting good cause for reconsideration pursuant to the black letter of CR 76.32, which provides (emphasis added):

> Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted ***only*** when it appears that the court has ***overlooked*** a material fact in the record, or a controlling statute or decision, or has ***misconceived*** the issues presented on the appeal or the law applicable thereto.

Petitioners' disappointment is not the standard for CR 76.32 relief, and *DIRECTV* does nothing to meet Petitioners' burden. Respondent prays this Court deny Petitioners' motion to supplement.

Submitted By:

/s/ _____
Robert E. Salyer (KY Bar # 91859)
Richard E. Circeo (KY Bar # 90243)
WILKES & MCHUGH, P.A.
P.O. Box 1747
Lexington, KY 40588-1747

Telephone Number: (859) 455-3356
Facsimile Number: (859) 455-3362

And

J.T. Gilbert, Esq.
Coy , Gilbert & Gilbert
212 N. Second St.
Richmond, KY 40475
Telephone Number: (859) 623-3877
Facsimile Number: (859) 624-5435
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document has been served via U.S. Mail, with sufficient postage thereon to ensure delivery, this 6th day of July, 2015, upon the following:

Donald L. Miller, II, Esq.
J. Peter Cassidy, III, Esq.
Quintairos, Prieto, Wood & Boyer, P.A.
9300 Shelbyville Road, Suite 400
Louisville, KY 40222

Hon. Jean Chenault Logue
Clark County Circuit Judge
Clark County Courthouse
34 S. Main St.
P.O. Box 313
Winchester, KY 40391

The Kentucky Court of Appeals
360 Democrat Dr.
Frankfort, KY 40601

/s/
Wilkes & McHugh, P.A.
Attorneys for Respondent

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

CASE NO. 2013-SC-000431

Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation, et al.
PETITIONERS/DEFENDANTS

v.

Beverly M. Wellner, Individually, an on behalf of the Estate, of Joe P. Wellner, deceased, and on behalf of the wrongful death beneficiaries of Joe P. Wellner
RESPONDENTS/PLAINTIFFS

On Appeal from the Kentucky Court of Appeals
2013-CA-002212
Clark County Circuit Court
Civil Action No. 10-CI-00472

RESPONSE TO MOTION TO SUPPLEMENT AUTHORITIES IN SUPPORT OF PETITIONERS' PENDING PETITION FOR REHEARING

Respondents oppose the motion to supplement. The U.S. Supreme Court decision which Petitioners seek to supplement as authority, *DIRECTV, Inc. v. Imburgia*, __U.S. __, __ S. Ct. __ 2015 WL 8546242 (2015), has no bearing upon the petition for rehearing. The motion, like the underlying petition for rehearing, should be denied.

RESPONSE

DIRECTV, Inc. v. Imburgia, does not change or add to the law pertinent to the case at bar. As that Opinion itself maintains, DIRECTV in effect simply restates the law from *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), regarding enforcing arbitration agreements per their terms.

Moreover, Petitioners are profoundly misinterpreting just what this Court was doing in the consolidated case of *Extendicare Homes, Inc. v. Belinda Whisman; Kindred Nursing Centers LP v. Janis Clark;* and *Kindred Nursing Centers LP v. Beverly Wellner*, 2015 WL 5634309 --- SW3d---- (Ky. 2015) (hereinafter "*Whisman*"). Petitioners continue to maintain that the Federal Arbitration Act (FAA), 9 USC § 2, pre-empts *Whisman*'s result. Now they wish to cite to *DIRECTV* in the matter to that effect.

In fact the FAA is not triggered by the *Whisman* decision. Petitioners' confusion lies in comprehending exactly the nature of *Whisman*'s analysis. Self-evidently, this Court did not announce a proscription against executing any kind of arbitration contract, i.e., that arbitration contracts, validly-made, would not be enforced according to their terms or under certain circumstances. As no one doubts, parties have an unencumbered right to enter into arbitration agreements in Kentucky. Rather, the *Whisman* Court engaged in an interpretation of a personal legal writing and grant of authority, i.e., a power-of-attorney executed by a private party.

III. As the Kentucky Supreme Court is the final interpreter of the General Assembly's statutes, so too is the Kentucky Supreme Court the final interpreter of the power-of-attorney.

To use an analogy, while the Kentucky General Assembly may not prevent anyone from executing an arbitration agreement, it certainly ***could*** discriminate against arbitration in effect ***by declining to create authority*** to execute arbitration contracts in a Kentucky statutory scheme setting up a statutory agent (*e.g.*, a guardian in a State guardianship scheme). And the U.S. Supreme Court has time and again made clear that State statutory interpretation of what a State legislature has created, *i.e.*, the proper interpretation of that State's own laws, is binding upon all courts, as the definitive ***interpretation***.[1] "There is no doubt that we are bound by a state court's construction of a state statute." *Wisconsin v. Mitchell*, 508 US 476, 483 (1993) (*citing R.A.V v. St. Paul*, 505 US 377, 381 (1992); *New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). Whereas the question of whether a State legislation is (U.S.) Constitutional or not, may fall upon the U.S. Supreme Court, ***interpreting what the State legislation <u>means</u>***, is entirely a State judicial function.

This same principle applies to interpreting the principal's meaning m a power-of- attorney. *See US. v. Bussey*, 452 FSupp 891, 895 (D.C.La. 1978) ("[W]e can find no authority which holds that federal law

---

[1] Logically, if the State Supreme Court erred in interpreting a State statute, it would be up to that's State legislature to correct the high court's error.

governs the interpretation or effect of a power of attorney."); *see also J.F Toner & Son, Inc. v. Farm Credit Bank of Baltimore*, 1992 WL 404372 (W.D.Va.) ("[T]he interpretation, issuance and use of a power of attorney is governed entirely by state law."). And even Petitioners have conceded that, while the courts may not discriminate against arbitration, principals surely can. And who is the final decision-maker in what a principal has done, in a controversy at bar?

This Court.

A power-of-attorney is in some sense the creation of "personal law," whereby a principal (analogous to the legislature empowering a statutory agent) is legally empowering the principal's agent to act on the principal's behalf. The Kentucky Supreme Court has engaged in ***interpretation***; it has not engaged in a ***proscription*** of arbitration, and thus the FAA is not implicated.

IV. *DIRECTV v. Imburgia* is a case pertaining to interpreting and construing a contract, and when to revoke that contract[2]; it is not a case pertaining to interpreting an instrument of agency authority.

In *DIRECTV v. Imburgia*, the media corporation defendant provided a form contract to its California consumers which included a conditional arbitration clause. This arbitration clause included language prohibiting class action arbitration. However, the (pre-*Concepcion*) clause also provided that "if the

---

[2] To provide the context and lineage behind the *DIRECTV* decision, in 2011 *AT&T v. Concepcion* struck down California's law restricting class action waivers in arbitration agreements.

'law of your state,' makes the waiver of class arbitration unenforceable, then the entire [arbitration] provision 'is unenforceable.'"[3] *See DIRECTV* at *3. Bizarrely, the California courts held that this provision incorporated pre-*Concepcion* (and invalid) California consumer law prohibiting class waivers in consumer arbitration into the *DIRECTV* contract, meaning that the arbitration clause as a whole was nullified by its own operation.

The U.S. Supreme Court reversed, keeping in mind the words of 9 USC § 2 (emphasis added):

> A written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract... shall be valid, irrevocable, and enforceable, save upon such grounds ***as*** exist at law or in equity ***for the revocation of any contract***.

California does not routinely import defunct, invalid law into contracts, just in order to dismantle those contracts. Given that the evinced intent of the contracting *DIRECTV* parties was to enter into an arbitration agreement, and given that this intention would be satisfied by the importation of valid post-*Concepcion* California law, and could only be upset by the importation of obsolete, pre-empted, pre-*Concepcion* law; normative contract construction would opt for the former. A court would only opt for

---

[3] That is, it appears that the company preferred bilateral arbitration; but, if forced to face a class action, then it would opt for in-court litigation.

the latter if it sought ***to revoke*** the agreement because of its subject matter.

Finding the existence of an agreement was never the problem. An agreement had undoubtedly been entered into in *DIRECTV*. The *DIRECTV* question arose in the context of construing that agreement, and what to enforce in that construction. And it involved contract revocation.

Not the case here. The question here pertains to the package of powers given by a principal to the agent in a written instrument, and does not pertain whatsoever, despite what Petitioners wish to believe, to revoking a contract or construing its terms.

And so the ultimate question must be this: What institution is the ultimate authority on the meaning of a power-of-attorney, executed and used in a particular State, and involving that States' citizens as principal and agent? The obvious answer is, again: That State's Supreme Court. The FAA does not signal any intention of Congress that State courts (or federal courts for that matter) interpret State agency law in such a manner that they would not otherwise do, were the FAA not to exist. Indeed, Respondent has searched and found no instance where State agency law has been commandeered to advance a federal statutory right, however much such a right is favoured.[4]

---

[4] Absurd and inconsistent results would arise if the American judiciary routinely interpreted State agency law contingent upon the existence of a federal statute to which a litigant had creatively tied a question of authority. Rather, a power-of-attorney is an objective statement of authority.

CONCLUSION

Petitioners have made amply clear their dissatisfaction with *Whisman*. It is time to move on.

Whisman, in its essence, is a case about interpreting a written grant of authority, the power-of-attorney-not contract interpretation or construction-and thus *DIRECTV* has no application. Certainly DIRECTV announces nothing constituting good cause for reconsideration pursuant to the black letter of CR 76.32, which provides (emphasis added):

> Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted ***only*** when it appears that the court has ***overlooked*** a material fact in the record, or a controlling statute or decision, or has ***misconceived*** the issues presented on the appeal or the law applicable thereto.

Petitioners' disappointment is not the standard for CR 76.32 relief, and DIRECTV does nothing to meet Petitioners' burden. Respondent prays this Court deny Petitioners' motion to supplement.

Submitted By:

/s/ Robert E. Salyer

Robert E. Salyer (KY Bar # 91859)
Richard E. Circeo (KY Bar# 90243)
WILKES & MCHUGH, P.A.
P.O. Box 1747
Lexington, KY 40588-1747
Telephone Number: (859) 455-3356
Facsimile Number: (859) 455-3362

And

J.T. Gilbert, Esq.
Coy , Gilbert & Gilbert
212 N. Second St.
Richmond, KY 40475
Telephone Number: (859) 623-3877
Facsimile Number: (859) 624-5435
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document has been served via U.S. Mail, with sufficient postage thereon to ensure delivery, this 6th day of July, 2015, upon the following:

Donald L. Miller, II, Esq.
J. Peter Cassidy, III, Esq.
Quintairos, Prieto, Wood & Boyer, P.A.
9300 Shelbyville Road, Suite 400
Louisville, KY 40222

Hon. Jean Chenault Logue
Clark County Circuit Judge
Clark County Courthouse
34 S. Main St. P.O. Box 313
Winchester, KY 40391

The Kentucky Court of Appeals
360 Democrat Dr.
Frankfort, KY 40601

/s/ Robert E. Salyer
Wilkes & McHugh, P.A.
Attorneys for Respondent

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC - 7 2016
OFFICE OF THE CLERK

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR PETITIONERS

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

Library of Congress

QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

RULE 29.6 STATEMENT

The parent corporations of Kindred Nursing Centers Limited Partnership are Kindred Nursing Centers East, LLC and Kindred Hospital Limited Partnership. The parent corporation of Kindred Nursing Centers East, LLC is Kindred Healthcare Operating, Inc.; and the parent corporations of Kindred Hospital Limited Partnership are Kindred Hospital West, LLC and Kindred Nursing Centers Limited Partnership. The parent corporation of Kindred Healthcare Operating, Inc. is Kindred Healthcare, Inc.

Kindred Healthcare, Inc. is a publicly traded corporation with no parent corporation. No publicly traded company owns 10% or more of the stock of Kindred Healthcare, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT 2
A. Factual Background. 4
B. Proceedings Below. 5
SUMMARY OF ARGUMENT 10
ARGUMENT 12
I. The Decision Below Conflicts With The FAA And Defies This Court's Precedents. 12
A. This Court Has Repeatedly Held That State-Law Rules That Disfavor Arbitration Are Preempted By The FAA. 13
B. The Kentucky Court's Explicit-Reference Rule Singles Out Arbitration For Suspect Status. 17
1. The Explicit-Reference Rule Is Not Applicable To Contracts Generally 19
2. The Explicit-Reference Rule Cannot Be Salvaged By The Kentucky Court's Reference To "Fundamental Constitutional Rights." 24

TABLE OF CONTENTS—continued

Page

C. Upholding The Decision Below Would Enable States To Impose Numerous Discriminatory Burdens On The Enforcement Of Arbitration Agreements. 29

II. The FAA Applies To The Question Of Contract Enforceability Presented Here. 31

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

CASES

14 Penn Plaza LLC v. *Pyett*,
556 U.S. 247 (2009) 14, 28

Allied-Bruce Terminix Cos. v. *Dobson*,
513 U.S. 265 (1995) 13, 18

Am. Health Care Ass'n v. *Burwell*,
--- F. Supp. 3d ----, 2016 WL 6585295
(N.D. Miss. Nov. 7, 2016) 33

Am. Heritage Life Ins. Co. v. *Orr*,
294 F.3d 702 (5th Cir. 2002) 27

Arthur Andersen LLP v. *Carlisle*,
556 U.S. 624 (2009) 18

AT&T Mobility LLC v. *Concepcion*,
563 U.S. 333 (2011) ..... *passim*

Brandenburg Health Facilities, LP v.
Mattingly,
2016 WL 3448733 (W.D. Ky. June
20, 2016) 29

Buckeye Check Cashing, Inc. v.
Cardegna,
546 U.S. 440 (2006) 18, 19, 31

Button v. *Drake*,
195 S.W.2d 66 (Ky. 1946) 23

Caley v. *Gulfstream Aerospace Corp.*,
428 F.3d 1359 (11th Cir. 2006) 27

CompuCredit Corp. v. *Greenwood*,
132 S. Ct. 665 (2012) 13

Cooper v. *MRM Inv. Co.*,
367 F.3d 493 (6th Cir. 2004) 27

TABLE OF AUTHORITIES—continued

Page(s)

DIRECTV, Inc. v. *Imburgia*,
136 S. Ct. 463 (2015) ..... *passim*

Doctor's Assocs., Inc. v. *Casarotto*,
517 U.S. 681 (1996) ..... *passim*

EEOC v. *Waffle House, Inc.*,
534 U.S. 279 (2002) 13

GGNSC Louisville Hillcreek, LLC v. *Watkins*,
2016 WL 815295 (W.D. Ky. Feb. 29, 2016) 29

Gilmer v. *Interstate/Johnson Lane Corp.*,
500 U.S. 20 (1991) 28

Howlett ex rel. Howlett v. *Rose*,
496 U.S. 356 (1990) 20

IFC Credit Corp. v. *United Bus. & Indus. Fed. Credit Union*,
512 F.3d 989 (7th Cir. 2008) 27

International Shoe Co. v. *Washington*,
326 U.S. 310 (1945) 26

James v. *Kentucky*,
466 U.S. 341 (1984) 20

Kimble v. *Marvel Entm't, LLC*,
135 S. Ct. 2401 (2015) 19

Logan v. *Zimmerman Brush Co.*,
455 U.S. 422 (1982) 23

Marmet Health Care Center, Inc. v. *Brown*,
132 S. Ct. 1201 (2012) (per curiam) 12, 16

TABLE OF AUTHORITIES—continued

Page(s)

Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) 16

Mitsubishi Motors Corp. v. *Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985) 27

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 23

Nitro-Lift Techs., L.L.C. v. *Howard*, 133 S. Ct. 500 (2012) (per curiam) 12, 14

Owensboro Health Facilities, L.P. v. *Henderson*, 2016 WL 2853569 (W.D. Ky. May 13, 2016) 29

Perry v. *Thomas*, 482 U.S. 483 (1987) ..... *passim*

Pine Tree Villa, LLC v. *Coulter*, 2016 WL 3030185 (W.D. Ky. May 25, 2016) 29

Ping v. *Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012) 6, 21, 22

Preferred Care of Delaware, Inc. v. *Hopkins*, 2016 WL 3546407 (W.D. Ky. June 23, 2016) 29

Preferred Care, Inc. v. *Bleeker*, 2016 WL 6636854 (E.D. Ky. Nov. 8, 2016) 22

TABLE OF AUTHORITIES—continued

Page(s)

Preferred Care, Inc. v. *Howell*,
2016 WL 4470746 (E.D. Ky. Aug. 19, 2016) 22

Preston v. *Ferrer*,
552 U.S. 346 (2008) 13, 17

Rent-A-Center, West, Inc. v. *Jackson*,
561 U.S. 63 (2010) 18

Riney v. *GGNSC Louisville St. Matthews, LLC*,
2016 WL 2853568 (W.D. Ky. May 13, 2016) 29

Saturn Distribution Corp. v. *Williams*,
905 F.2d 719 (4th Cir. 1990) 32

Scherk v. *Alberto-Culver Co.*,
417 U.S. 506 (1974) 18

Sec. Indus. Ass'n v. *Connolly*,
883 F.2d 1114 (1st Cir. 1989) 32

Shearson/Am. Express, Inc. v. *McMahon*,
482 U.S. 220 (1987) 28

Snowden v. *CheckPoint Check Cashing*,
290 F.3d 631 (4th Cir. 2002) 27

Southland Corp. v. *Keating*,
465 U.S. 1 (1984) 13, 16, 18, 30

Volt Info. Scis., Inc. v. *Bd. of Trs. of Leland Stanford Junior Univ.*,
489 U.S. 468 (1989) 18

CONSTITUTION AND STATUTES

9 U.S.C. § 2 ..... *passim*

TABLE OF AUTHORITIES—continued

Page(s)

28 U.S.C. § 1257(a) 2

Ky. Const.

§ 1 ..... 11, 25

§ 14 25

§ 19 25

§ 115 25

Ky. Rev. Stat.

§ 216.510 5

§ 387.590(10) 22

Mont. Code Ann. § 27-5-114(4) 29

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (Pet. App. 3a-118a) is reported at 478 S.W.3d 306. The order of the Supreme Court of Kentucky denying rehearing (Pet. App. 1a-2a) is unreported.

The following orders in *Clark* are all unreported: (1) the order of the Kentucky Court of Appeals denying interlocutory relief (Pet. App. 119a-125a); (2) the November 15, 2012 order of the Circuit Court denying the motion to dismiss and compel arbitration (Pet. App. 126a-127a); and (3) the January 9, 2012 order of the Clark County Circuit Court granting dismissal and compelling arbitration (Pet. App. 128a-130a).

The following orders in *Wellner* are all unreported: (1) the order of the Kentucky Court of Appeals denying interlocutory relief (Pet. App. 131a-137a); (2) the November 19, 2012 order of the Circuit Court denying the motion to dismiss and compel arbitration (Pet. App. 138a-139a); and (3) the January 9, 2012 order of the Clark County Circuit Court granting dismissal and compelling arbitration (Pet. App. 140a-142a).

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on September 24, 2015. Pet. App. 3a. That court denied rehearing on February 18, 2016. Pet. App. 1a-2a. On May 9, 2016, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including July 1, 2016. The petition for a writ of certiorari was filed on July 1, 2016 and

granted on October 28, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This Court has repeatedly held that the FAA "preclude[s] States from singling out arbitration provisions for suspect status." *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see also *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-69 (2015); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S.

333, 339 (2011); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

Yet the Kentucky Supreme Court, by a divided vote, did just that, refusing to enforce two arbitration agreements entered into by individuals who had been given express authority to accept "contracts" on behalf of their principals. Specifically, the court held that a power of attorney broadly authorizing an attorney-in-fact to enter into contracts extends to any kind of contract ***except*** a dispute-resolution agreement. An explicit reference to arbitration in a power-of-attorney document is required to authorize an attorney-in-fact to enter into an arbitration contract, the court said, because (in the court's view) such an agreement waives the principal's "sacred," "inviolate," and "God-given" right to a jury trial.

That anti-arbitration approach cannot be squared with this Court's precedents, which hold that Section 2 of the FAA preempts state-law rules that are "restricted to [the] field" of arbitration and do not "place[] arbitration contracts on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 468-69 (quotation marks omitted); see also *Concepcion*, 563 U.S. at 339; *Casarotto*, 517 U.S. at 687; *Perry*, 482 U.S. at 492 n.9.

Indeed, by tying its requirement of express reference to arbitration contracts to the waiver of a jury trial—the absence of which is a key defining characteristic of an arbitration proceeding—the majority below applied a rationale that, if permitted to stand, would open the door to numerous state-law rules erecting obstacles to the enforcement of arbitration agreements. As one of the dissenting Justices below put it, the Kentucky Supreme Court's decision makes a "clever contribution to th[e] new genre" of state-

court decisions seeking to evade this Court's precedents interpreting the FAA. Pet. App. 99a (Abramson, J., dissenting).

The Kentucky court's ruling defies three decades of this Court's settled precedent by imposing improper obstacles to the enforcement of arbitration agreements. The Court should reverse the decision below.

A. Factual Background.

Petitioners Kindred Nursing Centers Limited Partnership, *et al.* (collectively "Kindred") operate nursing homes and rehabilitation centers, including the Winchester Centre for Health and Rehabilitation (a/k/a Fountain Circle Health and Rehabilitation). Pet. App. 6a. Respondents Janis Clark and Beverly Wellner represent, respectively, the estates of Olive Clark and Joe Paul Wellner, two now-deceased residents of the Winchester Centre.[1]

Before the residents were admitted to the Winchester Centre, they had executed powers of attorney designating respondents Clark and Wellner, respectively, as their attorneys-in-fact. These powers of attorney conferred broad authority upon the attorneys-in-fact to enter into transactions and agreements relating to their principals' affairs.

Janis Clark's power of attorney, in pertinent part, conferred the power "[t]o draw, *make*, and sign in my name *any and all* checks, promissory notes, *contracts*, deeds or *agreements*; * * * and Generally to do and perform for me and in my name all that I might do if present." J.A. 7-8 (emphases added). Bev-

---

[1] Janis Clark is the daughter of Olive Clark, and Beverly Wellner is the wife of Joe Wellner. See Pet. App. 16a, 20a.

erly Wellner's power of attorney authorized her to "*make, execute and deliver* deeds, releases, conveyances and *contracts of every nature* in relation to both real and *personal property*." J.A. 10-11 (emphases added).

When their respective principals were admitted to the Winchester Centre, respondents signed the admission paperwork on their principals' behalf. Pet. App. 6a-7a. Each also executed a separate agreement titled "Alternative Dispute Resolution Agreement Between Resident and Facility (Optional)." *Id.* at 17a; J.A. 14-27. This arbitration agreement provided that any disputes arising out of the "[r]esident's stay at the Facility" would be resolved in arbitration. J.A. 14, 21. It also explained that "execution of this [arbitration] Agreement is not a precondition to the furnishing of services to the Resident by the Facility." J.A. 19, 26.

B. Proceedings Below.

Respondents brought suit against petitioners, alleging state statutory and common-law claims arising out of their principals' deaths while residing at the Winchester Centre. Each respondent asserted causes of action for wrongful death, personal injury, and violations of Ky. Rev. Stat. § 216.510 *et seq.*, which enumerates certain rights of long-term care residents.[2] Pet. App. 17a, 20a. In each case, petition-

---

[2] Under Kentucky law, the wrongful death claims belong to the respondents themselves, not their principals. See Pet. App. 8a-12a. Because respondents themselves did not agree to arbitration, the arbitrability of those wrongful death claims was not challenged in the Kentucky Supreme Court (Pet. App. 100a (Noble, J., dissenting)); nor is it at issue here. This case involves

ers moved to dismiss or stay the lawsuits, seeking to enforce the arbitration agreements between petitioners and the residents. *Id.* at 17a, 21a.

1. The state trial court initially dismissed each lawsuit in favor of arbitration. Pet. App. 18a, 21a. Subsequently, the Supreme Court of Kentucky held in *Ping* v. *Beverly Enterprises, Inc.*, 376 S.W.3d 581, 592-94 (Ky. 2012), that broad language in a power of attorney authorizing the attorney-in-fact to perform "every act and thing whatsoever requisite and necessary to be done" was limited by the specific authorizations to manage the principal's "financial affairs" and "health-care decisions," and did not include the authority to bind the principal to an optional arbitration agreement.[3]

Respondents moved for reconsideration of the dismissal orders. In each case, the trial court granted reconsideration and reversed its prior ruling, holding that the arbitration agreements were unenforceable because respondents lacked authority to bind their principals to arbitration. *Id.* at 18a, 21a.

2. Petitioners sought interlocutory review of both decisions in the Kentucky Court of Appeals. That court denied relief in both cases, holding that under *Ping*, respondents lacked authority under their pow-

---

the arbitrability of the remaining claims, which respondents are asserting on behalf of their deceased principals' estates.

[3] *Ping* did not have occasion to consider whether the powers of attorney at issue here—including documents that conferred express authority to make contracts—include the authority to enter into an arbitration agreement. As we discuss in more below (at 21-22), the decision in *Ping* thus provided no basis for the explicit-reference rule announced by the Kentucky Supreme Court here.

ers of attorney to bind their principals to arbitration. Pet. App. 19a-21a.

Petitioners then applied to the Supreme Court of Kentucky for interlocutory relief. *Id.* at 19a-20a, 23a. The state supreme court consolidated the two cases with a third case presenting similar issues, but involving a nursing home and rehabilitation facility that is not one of the petitioners.

3. A divided Supreme Court of Kentucky affirmed the Court of Appeals' orders denying interlocutory relief to compel arbitration, by a 4-3 vote.

The majority first considered whether the text of the powers of attorney at issue appeared to authorize the attorneys-in-fact to enter into arbitration agreements on their principals' behalf. It held that the power of attorney in *Wellner* did not provide the requisite authorization. Although the *Wellner* power of attorney authorized the attorney-in-fact to make "contracts" related to "personal property," and although the majority acknowledged that legal claims are a form of personal property, the majority concluded that an arbitration agreement does not "relate" to personal property, but rather solely to the principal's "constitutional right to access the courts and to trial by jury." Pet. App. 37a.

The majority held that the *Clark* power of attorney, by contrast, *did* convey the necessary authority, concluding that in light of its broad language, "it would be impossible to say that entering into a predispute arbitration agreement was not covered." *Id.* at 39a.

The majority then proceeded to consider, in *Clark* "as well as the other cases," the "extent to which the authority of an agent to waive his princi-

pal's fundamental constitutional rights to access the courts, to trial by jury, and to appeal to a higher court, can be inferred from a less-than-explicit grant of authority." Pet. App. 40a. It held that only a grant of authority to enter into arbitration agreements explicitly "expressed in the text of the power-of-attorney document" is sufficient to authorize an attorney-in-fact to agree to arbitration. *Id.* at 41a.

The majority opined that it would be "strange" to conclude that a general power of attorney authorized an attorney-in-fact to "waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude." Pet. App. 42a. Equating agreements to resolve disputes by arbitration with the relinquishment of fundamental rights such as freedom from slavery, familial and reproductive rights, and religious freedom, the majority held that courts may not infer from a general power of attorney the authority to waive a principal's right to a jury trial. *Id.* at 43a.

The majority went on to say that the drafters of the Kentucky Constitution had "deemed the right to a jury trial to be *inviolate*, a right that cannot be taken away; and, indeed, a right that is *sacred*, thus denoting *that right and that right alone* as a divine God-given right." Pet. App. 43a (last emphasis added). Based on this assessment of the status of the right to a jury trial, the majority concluded that an express grant of authority is needed before an attorney-in-fact can enter into an arbitration agreement on behalf of her principal.

The majority then "reject[ed] the notion" that its decision conflicted with the FAA or this Court's precedents. For example, it described *Concepcion* as holding only that state law is preempted only when it "prohibits outright the arbitration of a particular type of claim," and stated that its ruling did not run afoul of that prohibition because arbitration agreements between nursing homes and residents could still be enforced as long as they were signed by the resident or an attorney-in-fact with explicit authority to enter into arbitration agreements. Pet. App. 46a (quotation marks omitted). And the majority denied that its decision was "hostile" to arbitration, stating that its new rule "merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights." *Id.* at 47a-48a.

Chief Justice Minton and Justices Abramson and Noble dissented, with Justices Abramson and Noble each authoring a dissenting opinion.

The principal dissent, written by Justice Abramson and joined by the other two dissenting justices, explained that under the "clear precedent" of this Court, the majority was "not at liberty to conclude that in Kentucky a power of attorney that gives the agent express authority to contract does not include the authority to contract for arbitration * * *." Pet. App. 78a (Abramson, J., dissenting). Rather, "[w]hether one sympathizes with the majority's dislike of federally imposed arbitration or not, the inescapable fact remains that the majority has disregarded controlling law" under the FAA and that the arbitration agreements must be enforced. *Id.* at 99a. The dissent concluded that the majority's holding "fl[ies] in the face of federal law and [is] preempted

by the Supremacy Clause because it [is] clearly not * * * a state-law principle applicable to 'any contract' but rather one that singles out arbitration agreements for disfavored treatment." *Id.* at 78a.[4]

SUMMARY OF ARGUMENT

The decision below stands in stark defiance of this Court's repeated holdings that the FAA preempts state-law rules that disfavor arbitration agreements. By requiring that a power of attorney contain an explicit statement authorizing the attorney-in-fact to enter into an arbitration agreement—even though Kentucky law does not impose that requirement as to a power of attorney to enter into other types of contracts—the Kentucky court flatly violated the FAA's mandate that courts must "place[] arbitration agreements on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 468; see also *Casarotto*, 517 U.S. at 686-87; *Perry*, 482 U.S. at 492 n.9.

The Kentucky court sought to avoid FAA preemption by describing its rule as one of general applicability. Specifically, it claimed both that its rule is an application of general agency law and that Kentucky would require express authority before an attorney-in-fact could waive *any* constitutional right of the principal.

---

[4] Justice Noble "join[ed] Justice Abramson's dissent for its reasoning on the main points in these cases," but separately dissented "to begin correcting any confusion about agency law by the part of our *Ping* decision that was actually not determinative in the result of the case." Pet. App. 116a. Unless otherwise noted, references to the "dissent" refer to Justice Abramson's dissenting opinion.

But these justifications are squarely precluded by this Court's precedents. *First*, there is no general principle of Kentucky agency law (or any jurisdiction's agency law, for that matter) that would support the illogical conclusion that the authority to enter into "contracts" delegates the power to enter into any contract *except* a dispute-resolution agreement. Accordingly, the state court's interpretation is like the one declared preempted in *Imburgia*, in which this Court explained that "nothing in the [state court's] reasoning suggest[ed]" that a court in that State "would reach the same interpretation * * * in any context other than arbitration." 136 S. Ct. at 469.

Second, the *only* constitutional rights to which the court's reasoning applies are the rights to a jury trial and access to courts—the waiver of which, not by happenstance, are the most defining characteristics of an arbitration agreement. The court's explicit-authorization rule does not apply, for example, even to other constitutional rights that are relevant to contracting—such as Kentucky's constitutional right "of acquiring and protecting property." Ky. Const. § 1; see also Pet. App. 93a (Abramson, J., dissenting). Nor does it apply to forum-selection clauses that select a forum in which a party would not otherwise be subject to personal jurisdiction—even though such a choice of forum waives that party's due process rights. Thus, the Kentucky court's rule is a contract defense that specifically targets arbitration agreements and is accordingly preempted by the FAA.

Indeed, if the decision below were affirmed, States would have virtual carte blanche authority to impose discriminatory barriers to the enforcement of arbitration agreements. For example, the Montana statute rejected in *Casarotto*—requiring notice of an

arbitration provision to be highlighted and capitalized on the first page of a contract—could be resurrected by simply recharacterizing it as a rule that special notice is required for any contract waiving the rights to a jury trial and access to courts. Along those lines, States would be free to conjure up new hurdles to arbitration agreements, such as requiring that any waiver of a jury trial be signed in triplicate form to be effective. And a State could outlaw predispute arbitration agreements entirely by adopting the rule that, as a matter of state law, advance waivers of the right to a jury and other constitutional rights are invalid.

At the end of the day, the decision below is yet another in a long line of state court decisions seeking to evade the FAA's prohibition against discriminatory burdens on the enforcement of arbitration agreements. See, *e.g.*, *Imburgia*, 136 S. Ct. 463; *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam); *Marmet Health Care Center, Inc.* v. *Brown*, 132 S. Ct. 1201 (2012) (per curiam). As Justice Abramson observed in dissent, the decision makes "a clever contribution to this new genre" of recent cases that have attempted "to 'rule around' the FAA." Pet. App. 99a (Abramson, J., dissenting). Such end-runs improperly flout this Court's precedents. The Kentucky court's decision accordingly should be reversed.

ARGUMENT

I. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

The Kentucky Supreme Court's rule requiring powers of attorney to contain specific language that expressly authorizes attorneys-in-fact to enter into

arbitration agreements cannot be squared with the FAA's mandates.

A. This Court Has Repeatedly Held That State-Law Rules That Disfavor Arbitration Are Preempted By The FAA.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted); see also *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 668 (2012) (the FAA was "enacted in 1925 as a response to judicial hostility to arbitration") (citing *Concepcion*, 563 U.S. at 339); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (explaining that the FAA "seeks broadly to overcome judicial hostility to arbitration agreements").

Section 2 of the FAA therefore commands that "[a]n agreement to arbitrate is valid, irrevocable, and *enforceable as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry*, 482 U.S. at 492 n.9 (quoting 9 U.S.C. § 2). "Section 2 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner." *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008) (quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984)).

"By enacting § 2, * * * Congress precluded States from singling out arbitration provisions for suspect status" (*Casarotto*, 517 U.S. at 687) or from invalidating arbitration provisions through state-law rules that "apply only to arbitration or that derive their

meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339; see also *Imburgia*, 136 S. Ct. at 469 (FAA preempts state-law interpretation of a contract that is "restricted to th[e] field" of arbitration); *Perry*, 482 U.S. at 492 n.9 ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with * * * § 2."). Nor may States apply generally applicable state-law doctrines "in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341.

The FAA also precludes reliance on "judicial policy concern[s] as a source of authority" for refusing to enforce arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009); see also *Concepcion*, 563 U.S. at 342 (explaining that the FAA was enacted to eliminate the "'great variety' of 'devices and formulas' declaring arbitration against public policy"). Thus, it is immaterial that the discriminatory rule here derives from common law rather than a statute; the FAA preempts any "state law, whether of legislative *or judicial* origin," that disfavors arbitration. *Perry*, 482 U.S. at 492 n.9 (emphasis added); see *Casarotto*, 517 U.S. at 687 n.3.

Based on these well-established principles, this Court repeatedly has overturned decisions by state courts when, as here, they either have ignored or refused to apply the FAA and this Court's precedents interpreting it. As the Court has explained, because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 133 S. Ct. at 501.

Just last Term, this Court reversed a decision of the California Court of Appeal that had adopted a dubious interpretation of an arbitration agreement in the course of declaring the agreement unenforceable. *Imburgia*, 136 S. Ct. at 468-71. This Court concluded that the California courts would not have reached the same interpretation of the contract "in any other context other than arbitration"; instead, the California court's analysis was "restricted to that field"—precisely the kind of state-law discrimination against arbitration that the FAA flatly forbids. *Id.* at 469. And the Court underscored that "[t]he Federal Arbitration Act is a law of the United States," and, "[c]onsequently, the judges of every State must follow it." *Id.* at 468.

Two decades ago, in *Casarotto*, the Court reached the very same conclusion, holding that "threshold limitations placed specifically and solely on arbitration provisions" are unenforceable because they are "antithetical to" the "'goals and policies' of the FAA to promote arbitration by treating arbitration as favorably as any other contract." 517 U.S. at 688. Thus, the FAA preempted a Montana statute requiring special notice of an arbitration provision on the first page of a contract, because the statute "singl[ed] out arbitration provisions for suspect status." *Id.* at 687.

The Court refused to excuse this special notice requirement as a particular application of a general state policy that purportedly unexpected contract terms must be conspicuous, and instead reiterated that "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what * * *

the state legislature cannot.'" *Casarotto*, 517 U.S. at 687 n.3 (quoting *Perry*, 482 U.S. at 492 n.9).

Similarly, the Court has recognized that the FAA preempts and forbids enforcement of state-law rules categorically "prohibiting arbitration of a particular type of claim," because such state-law bars are "contrary to the terms of and coverage of the FAA." *Marmet*, 132 S. Ct. at 1204. In *Marmet*, this Court vacated and remanded a decision of "the Supreme Court of Appeals of West Virginia," which had declared "unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes." 132 S. Ct. at 1202. "[B]y misreading and disregarding the precedents of this Court interpreting the FAA," the West Virginia court "did not follow controlling federal law implementing th[e] basic principle" that both "[s]tate and federal courts must enforce the Federal Arbitration Act." *Ibid.*; see also *id.* at 1203 ("The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.").

Moreover, *Casarotto* and *Marmet* are far from alone: On several other occasions, this Court has declared state law preempted when it runs afoul of the FAA. See *e.g.*, *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (FAA preempted state law requiring judicial resolution of claims involving punitive damages); *Perry*, 482 U.S. at 489-491 (FAA preempted state law requiring that litigants be provided a judicial forum for wage disputes); *Southland*, 465 U.S. at 10 ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of

claims which the contracting parties agreed to resolve by arbitration," including for claims brought under state franchise-investment law); cf. *Preston*, 552 U.S. at 358-59 (FAA preempted state law requiring claims under California's Talent Agents Act to be submitted to the Labor Commissioner in the first instance, rather than to arbitration (or litigation)).

In sum, the Court has not hesitated to strike down the sweeping panoply of rules and devices that States—including state supreme courts—have crafted to evade the FAA. As we next explain, this Court should reach the same conclusion here.

B. The Kentucky Court's Explicit-Reference Rule Singles Out Arbitration For Suspect Status.

The Kentucky Supreme Court's decision in this case similarly failed to adhere to the FAA and this Court's precedents interpreting that statute.

In both of the individual cases consolidated before the Kentucky court (*Clark* and *Wellner*), an attorney-in-fact for the resident had been granted authority to enter into "contracts" on the resident's behalf. Pet. App. 19a, 22a. The majority below nonetheless held that those attorneys-in-fact could not enter into arbitration agreements—even though they did have the power to enter into *other* kinds of contracts—because the power of attorney did not specifically mention arbitration agreements. This explicit-reference rule clearly "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity." *Casarotto*, 517 U.S. at 688.

Indeed, it is hard to imagine a more fundamental precept under the FAA than this Court's repeated admonition that arbitration provisions must "be

placed 'upon the same footing as other contracts.'" *Id.* at 687 (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Accord, *e.g.*, *Imburgia*, 136 S. Ct. at 468; *Concepcion*, 563 U.S. at 339; *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *Allied-Bruce*, 513 U.S. at 271; *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Perry*, 482 U.S. at 482 n.9; *Southland*, 465 U.S. at 16 & n.11.

The parallels to *Casarotto* are striking. The Montana statute struck down in that case required contracts with arbitration clauses to provide notice of the clauses in underlined capital letters on the first page of the contract. The Court held that this heightened-notice requirement "directly conflict[ed] with § 2 of the FAA because the State's law condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." 517 U.S. at 687.

The Kentucky Supreme Court's rule similarly conditions the enforceability of arbitration agreements signed by attorneys-in-fact on an explicit-reference requirement that is not applicable to other kinds of contracts. See also Pet. App. 78a (Abramson, J., dissenting) (noting that the majority's rule requiring an explicit mention of arbitration "singles out arbitration agreements for disfavored treatment in the same vein as the statutes and judicially-created rules" that this Court has previously held preempted by the FAA).

To sustain the decision below would thus require the Court to over more than three decades of prece-

dent. Yet "[o]verruling precedent is never a small matter," and *stare decisis*—"a foundation stone of the rule of law"—"carries enhanced force when a decision * * * interprets a statute" such as the FAA; when "Congress has spurned multiple opportunities to reverse" this Court's precedents if it so chose; and in "cases involving property and contract rights," "because parties are especially likely to rely on such precedents when ordering their affairs." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-10 (2015) (quotation marks omitted).

The majority below offered two principal reasons for excusing its explicit-reference rule's discriminatory treatment of arbitration: (1) it deemed the rule to be both a general application of Kentucky agency law and a construction of powers of attorney in general; and (2) it asserted that the explicit-reference rule applies to the waiver of all fundamental constitutional rights. Neither explanation for the state-law rule saves the holding below from preemption.

1. The Explicit-Reference Rule Is Not Applicable To Contracts Generally.

Like the court below here, the plaintiffs in *Imburgia* pointed to the California Court of Appeal's purportedly neutral interpretation of the phrase "law of your state" in a consumer contract. This Court recognized, of course, that "California courts are the ultimate authority on [California] law." *Imburgia*, 136 S. Ct. at 468. Nonetheless, it was for this Court to "decide whether the decision of the California court places arbitration contracts "'on equal footing with all other contracts.'" *Ibid.* (quoting *Buckeye*, 546 U.S. at 443).

In other words, to assess whether the FAA's dictates have been honored, the Court must determine whether a state court would in fact "interpret contracts other than arbitration contracts the same way," rather than simply accepting the state court's professions of neutrality. *Id.* at 469; see also *ibid.* ("Since the interpretation of a contract is ordinarily a matter of state law to which we defer * * * we must decide not whether [the state court's] decision is a correct statement of California law but whether (assuming it is) that state law is consistent with the Federal Arbitration Act."); *Perry*, 482 U.S. at 492 n.9 (explaining that, as a matter of "choice-of-law," "the principles of federal common law" embodied by the FAA trump "state-law holding[s]" if those holdings "rely on the uniqueness of an agreement to arbitrate as a basis" for resisting enforcement).[5]

Applying that standard, this Court held in *Imburgia* that the FAA precluded the California Court of Appeal's interpretation of the term "law of your state" to exclude the preemptive force of federal law because "nothing in the [state court's] reasoning suggest[ed]" that a court in that state "would reach

---

[5] In other contexts, such as the independent-and-adequate-state-grounds doctrine, this Court likewise is not obligated to accept at face value a state court's reasoning. In that context, the Court instead inquires whether the state procedural rule purportedly precluding federal review has been "firmly established and regularly followed." *James* v. *Kentucky*, 466 U.S. 341, 348 (1984); see also, *e.g.*, *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 369 (1990) ("A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.'"); *id.* at 369 n.16 (collecting cases).

the same interpretation of 'law of your state' in any context other than arbitration." 136 S. Ct. at 469.

That same principle controls the outcome here.

The majority below's description of its rule as an application of the "general principle[] * * * that an attorney-in-fact may not act beyond the powers he has been granted under the power-of-attorney instrument" (Pet. App. 45a) is therefore not controlling. A rule characterized as a particular application of generally-applicable contract doctrines is still preempted when that rule is "applied in a fashion that disfavors arbitration" (*Concepcion*, 563 U.S. at 341) or that is "restricted to that field" (*Imburgia*, 136 S. Ct. at 469).

And there can be no doubt that the majority's explicit-reference rule fits that description: As the dissent below explained, the rule "burdens agent-entered arbitration agreements more heavily than either agent-entered contracts generally, or judicial forms of agent-initiated dispute resolution." Pet. App. 92a (Abramson, J., dissenting). In fact, we are not aware of—nor have been able to find—*any* Kentucky decisions holding that any other types of contracts are subject to this explicit-reference rule. In other words, we have located no other decision drawing the (illogical) conclusion that the authority to enter into "contracts" really means the authority to enter into all contracts *except* one specific kind of contract.

The Kentucky Supreme Court's earlier decision in *Ping*, for example, offers no support for the explicit-reference rule. That case held that an attorney-in-fact lacked authority to enter into an optional arbitration agreement because "the only decisions specif-

ically provided for in the document" were "to make financial and health-care decisions." 376 S.W.3d at 591. The defendant had relied on general language that the attorney-in-fact had "full and complete power and authority to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done," but the court rejected the claim that this language provided "a sort of universal authority beyond th[e] express provisions." *Id.* at 590-92. Whatever the merits of that decision, it is clearly inapplicable here, as the powers of attorney in this case *explicitly* authorized the attorneys-in-fact to make or enter into contracts. See also Pet. App. 70a-72a (Abramson, J., dissenting) (distinguishing *Ping* on this basis, and collecting cases doing the same).

It is also significant that Kentucky law erects no similar barriers to allowing state-appointed guardians—as opposed to attorneys-in-fact—to enter into arbitration agreements on behalf of their wards. As a federal court in Kentucky recently explained in enforcing an arbitration agreement entered into by a guardian, "a disabled person, once appointed a guardian, is stripped of several rights—including 'the right * * * to enter into contractual relationships.'" *Preferred Care, Inc.* v. *Howell*, 2016 WL 4470746, at *3 (E.D. Ky. Aug. 19, 2016) (quoting Ky. Rev. Stat. § 387.590(10)). "So it follows that these rights, once taken from the ward, are vested in the guardian to care for him"—and this right to enter into contractual relationships generally includes the right to enter into arbitration agreements, even though the Kentucky guardianship statute does not explicitly reference arbitration. *Ibid.*; accord *Preferred Care, Inc.* v. *Bleeker*, 2016 WL 6636854, at *4 (E.D. Ky. Nov. 8, 2016) (same).

Finally, in one of the two cases consolidated before the court below, *Wellner*, the majority identified a second reason for refusing to enforce the arbitration agreement. Even though the *Wellner* power of attorney authorized the attorney-in-fact to make contracts "'*in relation to* * * * *personal property*,'" Pet. App. 22a—and the majority "certainly agree[d]" that "personal injury claim[s]" and other "'choses-in-action are personal property,'" *id.* at 36a (quoting *Button* v. *Drake*, 195 S.W.2d 66, 69 (Ky. 1946))—the majority nonetheless held the power to agree to arbitration outside the scope of the attorney-in-fact's authority. Instead, the majority said, an agreement to arbitrate the principal's legal claims somehow did not "relat[e] to" the claims, but rather solely to the principal's "constitutional right" to trial by jury, which is not "personal property." *Id.* at 37a.

This conclusion not only defies common sense, but also is preempted by the FAA, because the reasoning would not apply to any agreement other than an agreement to arbitrate. In light of Kentucky's long-standing recognition that causes of action are personal property (see *Button*, 195 S.W.2d at 69), it is unthinkable that Kentucky courts would interpret the phrase "contracts * * * in relation to * * * personal property" to exclude any other kind of agreement relating to an individual's legal claims. See Pet. App. 85a (Abramson, J., dissenting); cf. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (recognizing "that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause") (citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). In short, the decision below impermissibly discriminated against arbitration in its treatment of both the *Clark* and *Wellner* powers of attorney.

2. *The Explicit-Reference Rule Cannot Be Salvaged By The Kentucky Court's Reference To "Fundamental Constitutional Rights."*

Similarly unavailing is the majority's rationale that its explicit-reference rule does not disfavor arbitration because the rule applies to all "fundamental constitutional rights." Pet. App. 48a. That rationale falters for several reasons.

First, the majority's own reasoning does not apply to all constitutional rights, but rather singles out only those rights that are inherently affected by arbitration agreements. The majority describes the right to a jury trial as the one and only "sacred" constitutional right in Kentucky. Pet. App. 43a ("[T]he drafters of our Constitution deemed the right to a jury trial * * * *and that right alone* as a divine God-given right." (emphasis added)). There is nothing in the majority opinion to suggest that its reasoning would apply to any waiver of a constitutional right *other* than the right to a jury trial—which is "the one right that just happens to be correlative to the right to arbitrate." *Id.* at 95a (Abramson, J., dissenting) (emphasis omitted).[6]

---

[6] The dissent also explained in detail that, as a matter of Kentucky law and history, the majority's elevation of the right to a jury trial to sacrosanct status is substantially overstated in civil cases like this one. Rather, "the 'sacredness' of the jury-trial guarantee had much more to do with the protection it afforded *criminal* defendants" in felony cases, not civil plaintiffs. Pet. App. 89a-90a n.26 (Abramson, J., dissenting) (emphasis added). The dissent further noted that as a matter of Kentucky practice, the right to a jury trial in civil cases is waived by default—a litigant must file a timely written notice demanding a jury trial to preserve the right—further undermining the majority's

In *Concepcion*, moreover, this Court gave as an example of a preempted state law one that would classify as unconscionable an arbitration agreement that "disallow[s] an ultimate disposition by a jury." 563 U.S. at 342. The Court thus recognized that foregoing a jury trial in favor of informal dispute resolution is an inherent feature of arbitration. As the dissent below summarized, the FAA and this Court's precedents preclude courts from "either disfavoring arbitration directly under state law, or disfavoring it indirectly by favoring its correlative opposite—a judicial trial." Pet. App. 89a (Abramson, J., dissenting).

The other rights under the Kentucky Constitution principally relied upon by the majority to justify its explicit-reference rule also fall within the category of such "rights" inherently affected by arbitration agreements. According to the majority, "[t]he need for specificity" in a power of attorney "is all the more important when the affected fundamental rights include the right of access to the courts (Ky. Const. § 14) [and] the right of appeal to a higher court (Ky. Const. § 115)." Pet. App. 41a. The absence of these judicial procedures are—like the absence of a jury trial—also inherent characteristics of arbitration.

By contrast, Kentucky's Constitution includes other protections as to which an explicit authorization is *not* required. For example, the Kentucky Constitution confers the "inherent and alienable right[] * * * of acquiring and protecting property" (Ky. Const. § 1) and guarantees that no law shall be enacted "impairing the obligation of contracts" (*id.* § 19). Yet as Justice Abramson explained, attorneys-in-fact in

---

elevation of that right "to a heretofore unrecognized status." *Id.* at 98a-99a.

Kentucky "routinely exercise, compromise, and waive fundamental constitutional rights on behalf of their principals"—such as the right to acquire and dispose of property. Pet. App. 93a (Abramson, J., dissenting).

The majority's opinion likewise does not indicate that explicit authorization is necessary to confer the authority to enter into a forum selection clause—and we are aware of no other Kentucky decision so holding—even though such clauses may waive a party's constitutional due process rights by selecting a forum in which that party would otherwise not be subject to personal jurisdiction. See, *e.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) ("[D]ue process requires" that, in order to subject a defendant to personal jurisdiction in a forum, the defendant must "have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'").

Thus, there is no evidence that generally-applicable principles of Kentucky law require powers of attorney to make explicit reference to the authority to affect or waive any of the principal's constitutional rights. That should "lead [this Court] to conclude that the [Kentucky] court's" explicit-reference rule "is unique" and "restricted to th[e] field" of arbitration. *Imburgia*, 136 S. Ct. at 469.[7]

---

[7] It is also telling—and entirely consistent with this Court's precedents—that federal circuit courts have repeatedly rejected arguments that a heightened standard requiring a "knowing and voluntary" waiver of the Seventh Amendment right to a jury should apply to the enforcement of an arbitration agreement. As the Fourth Circuit put it, "[c]ommon sense dictates that we reject" the argument that a plaintiff "could not have knowingly

Second, and relatedly, the majority "ma[d]e plain the hostility to arbitration" that underlies its holding (Pet. App. 97a (Abramson, J., dissenting)) when it justified its explicit-reference rule by comparing arbitration agreements—favored under federal law—to binding the principal to "personal servitude"; terminating "the principal's parental rights"; "put[ting] her child up for adoption"; or stripping the principal of her "right to worship freely" (Pet. App. 42a).

These inflammatory and unsupportable analogies reflect precisely the type of hostility to arbitration as a means of dispute resolution that this Court has repeatedly declared out of bounds under the FAA. As the Court emphasized over three decades ago, "we are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler–*

---

and voluntarily waived her Seventh Amendment rights to a jury trial" because the "'loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.'" *Snowden* v. *CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (citation omitted); see also, *e.g.*, *IFC Credit Corp.* v. *United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 994 (7th Cir. 2008) ("[A]n agreement to arbitrate * * * surrenders not only a jury trial but also the right to a judicial forum[,] [yet] [c]ourts do not impose special negotiation requirements on arbitration clauses in form contracts."); *Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1370-73 (11th Cir. 2006) (explicitly rejecting a "knowing and voluntary" requirement for the waiver of jury trial rights pursuant to an arbitration agreement); *Cooper* v. *MRM Inv. Co.*, 367 F.3d 493, 506 (6th Cir. 2004) (same); *Am. Heritage Life Ins. Co.* v. *Orr*, 294 F.3d 702, 711 (5th Cir. 2002) ("[B]y agreeing to arbitration, Appellants have necessarily waived * * * their right to a judicial forum; and * * * their corresponding right to a jury trial.").

Plymouth, Inc., 473 U.S. 614, 626-27 (1985); see also, *e.g.*, *14 Penn Plaza*, 556 U.S. at 266-67 ("reliance on * * * overt hostility to the enforcement of arbitration agreements would be ill-advised"); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) ("generalized attacks on arbitration [that] rest on suspicion of arbitration" as a means of dispute resolution are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes") (quotation marks and alterations omitted); *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 231-32 (1987) ("it is difficult to reconcile" earlier decisions' "mistrust of the arbitral process with this Court's subsequent decisions involving the [Federal] Arbitration Act").

Third, even if the majority's explicit-reference rule genuinely did apply to such constitutional rights as the right to "worship freely" or the right against involuntary "personal servitude"—rather than being a concocted, post-hoc hypothetical—the majority's protestations of neutrality would still rest on a false equivalence. The majority's fanciful examples describe "rights that an ordinary attorney-in-fact is rarely, if ever, asked to address on the principal's behalf." *Id.* at 97a (Abramson, J., dissenting). By contrast, arbitration agreements "are commonplace." *Ibid.* Thus, as Justice Abramson summarized, "the application of [the explicit-reference] rule will clearly have a disproportionate effect on the ability of agents to enter arbitration agreements (as opposed to other contracts)." *Id.* at 98a. This "disproportionate impact"

is impermissible under the FAA. *Concepcion*, 563 U.S. at 342.[8]

C. Upholding The Decision Below Would Enable States To Impose Numerous Discriminatory Burdens On The Enforcement Of Arbitration Agreements.

If invoking the right to a jury trial or access to a court could provide sufficient grounds to subject arbitration agreements to legal rules not applicable to other contracts, States would be free to discriminate against arbitration in countless ways—even though decades of this Court's precedents hold the exact opposite.

For example, the Montana statute at issue in *Casarotto* declared arbitration agreements unenforceable unless "[n]otice that [the] contract is subject to arbitration" is "typed in underlined capital letters on the first page of the contract" (Mont. Code Ann. § 27-5-114(4)). If the decision below were affirmed, Montana could simply revise that law to replace the word "arbitration" with the term "waiver of

---

[8] For the reasons just discussed, every federal district judge in Kentucky that has addressed the question has held that the state-law rule announced by the decision below is wholly irreconcilable with this Court's precedents and therefore preempted by the FAA. See *Preferred Care of Delaware, Inc.* v. *Hopkins*, 2016 WL 3546407, at *2-4 (W.D. Ky. June 23, 2016); *Brandenburg Health Facilities, LP* v. *Mattingly*, 2016 WL 3448733, at *4 & n.3 (W.D. Ky. June 20, 2016); *Pine Tree Villa, LLC* v. *Coulter*, 2016 WL 3030185, at *3 n.1 (W.D. Ky. May 25, 2016); *Owensboro Health Facilities, L.P.* v. *Henderson*, 2016 WL 2853569, at *4 (W.D. Ky. May 13, 2016); *Riney* v. *GGNSC Louisville St. Matthews, LLC*, 2016 WL 2853568, at *3 (W.D. Ky. May 13, 2016); *GGNSC Louisville Hillcreek, LLC* v. *Watkins*, 2016 WL 815295, at *5 n.3 (W.D. Ky. Feb. 29, 2016).

a jury trial" in order to invoke the constitutional right relied upon by the Kentucky court here. Yet that revised statute would be no different than the special notice rule this Court held preempted two decades ago. See 517 U.S. at 683, 687-88.

And endorsing the rationale below would open the door to discriminatory state laws far more burdensome than notice requirements. For example, without ever mentioning the word "arbitration," States could ban predispute waivers of a jury trial or access to a judicial forum—perhaps invoking the theory that a party will not appreciate the importance of such rights until after a dispute has arisen (and knowing full well that a plaintiff who has already brought a lawsuit in court is not likely to agree *ex post* to arbitrate his claims). That would invalidate all predispute arbitration agreements.

Applying the fig leaf of referring to waivers of jury trials or access to courts does not change the substance of such an anti-arbitration rule. "The 'goals and policies' of the FAA * * * are antithetical to threshold limitations placed specifically and solely on arbitration provisions." *Casarotto*, 517 U.S. at 688 (quoting *Southland*, 465 U.S. at 10).

In short, the Kentucky court cannot avoid the preemptive force of the FAA simply by recharacterizing its heightened explicit-reference requirement as one that is not trained on arbitration but instead is targeted towards rights (like the waiver of a jury trial and access to courts) that are fundamental characteristics of arbitration.

II. The FAA Applies To The Question Of Contract Enforceability Presented Here.

Unable to show that the decision below comports with the FAA, respondents at the petition stage argued that the FAA does not apply here at all (see Opp. 16)—a position that even the majority below did not endorse. See Pet. App. 44a-48a (applying the FAA). According to respondents, the FAA applies only to "dispute[s] regarding an arbitration agreement's validity," not to "dispute[s] as to whether an agreement was 'ever concluded.'" Opp. 16 (quoting *Buckeye*, 546 U.S. at 444 n.1).

Respondents' contention is mistaken for multiple reasons. To begin with, there is no contract-formation dispute here: each of the attorneys-in-fact undisputedly entered into a written arbitration agreement on behalf of her principal, and the question is only whether those agreements should be enforced. That question is squarely governed by Section 2 of the FAA. See 9 U.S.C. § 2 (providing that written agreements to arbitrate disputes are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); see also Pet. App. 100a (Noble, J., dissenting) (remarking that the majority's elevation of the jury trial right and explicit reference rule does not "actually affect[] the *formation* of a contract to arbitrate").

In any event, parties cannot circumvent the FAA by attempting to characterize discriminatory state-law rules governing the enforceability of arbitration agreements as rules of contract formation. Indeed, this Court rejected an analogous attempt by the respondents in *Imburgia*, who contended that the FAA was inapplicable because the dispute there involved the "threshold question of whether there's an arbi-

tration agreement in the first place." Tr. of Oral Arg. at 30, *Imburgia*, 2015 WL 6552642, at *30; see also *id.* at *41, 46-47.

This Court squarely rebuffed that attempt to limit the FAA's reach, recognizing that the question before it was whether the California court's "*interpretation* of [the] contract * * * is consistent with the [FAA]." *Imburgia*, 136 S. Ct. at 468 (emphasis added). It should do the same here.

Even if the issue here were genuinely one of contract formation, that would still make no difference. In *Saturn Distribution Corp.* v. *Williams*, 905 F.2d 719 (4th Cir. 1990), for example, the court considered—and squarely rejected—the argument "that the scope of FAA preemption is limited to laws covering existing arbitration agreements, and does not extend to laws that prohibit or regulate the *formation* of arbitration agreements." *Id.* at 723 (emphasis added). Striking down a Virginia law "that prohibit[ed] automobile manufacturers and dealers from entering into agreements that contain mandatory alternative dispute resolution provisions," the *Saturn* court explained that "[t]o restrict the FAA to existing agreements would be to allow states to 'wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts.'" *Id.* at 722, 723 (quotation marks omitted); accord *Sec. Indus. Ass'n* v. *Connolly*, 883 F.2d 1114, 1117 (1st Cir. 1989) (holding that the FAA preempts state regulation restricting securities firms from entering into future arbitration agreements).

These holdings make sound practical sense: If respondents were correct, a State could enact a law expressly forbidding attorneys-in-fact to enter into arbitration agreements under any circumstances, or a

law providing that consumers lack the capacity to enter into arbitration agreements unless they receive prior court approval, and those laws would be immune from federal scrutiny even if they blatantly disfavor arbitration. The FAA's protections cannot be nullified simply by dressing up state-law hostility to arbitration in the garb of "contract formation."[9]

---

[9] In a supplemental brief filed at the petition stage, we explained why this case is not affected by a rule promulgated by the Centers for Medicare & Medicaid Services that would prohibit Medicare-participating skilled nursing facilities and Medicaid-participating nursing facilities from entering into new predispute arbitration agreements with residents at their facilities. *First*, that rule applies only prospectively, to contracts entered into after its November 28, 2016 effective date. Pet. Supp. Br. 1. *Second*, the rule's validity is the subject of a pending lawsuit and, in a decision rendered after the filing of the supplemental brief, the district court issued a preliminary injunction barring enforcement of the rule, holding that the plaintiffs had shown a substantial likelihood of success on the merits of their claims that the rule violates the FAA and exceeds the agency's authority. See *Am. Health Care Ass'n* v. *Burwell*, --- F. Supp. 3d ----, 2016 WL 6585295 (N.D. Miss. Nov. 7, 2016).

CONCLUSION

The judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

DECEMBER 2016

AND
REPS.

No. 16-32

FILED
JAN - 6 2017
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION CENTER, et al.,

Petitioners,

v.

JANIS E. CLARK, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONDENTS' BRIEF ON THE MERITS

JAMES T. GILBERT
COY, GILBERT,
SHEPHERD & WILSON
212 North Second Street
Richmond, KY 40475
(859) 623-3877

ROBERT E. SALYER
Counsel of Record
WILKES & MCHUGH, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Federal Arbitration Act requires that a power of attorney be read broadly enough to effect the formation of an arbitration agreement, when the power of attorney would not otherwise be so read if the construing State court sought only to be faithful to the expressed intentions of the principal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. Factual Background	4
II. Proceedings Below	7
SUMMARY OF ARGUMENT	11
ARGUMENT	14
I. The FAA does not reach to the formation issue addressed by the Kentucky Supreme Court's decision below	15
A. The FAA does not preempt determinations under State law that no agreement ever formed	16
B. This Court's cases upon which Kindred relies have been directed to provisions of State law rendering arbitration agreements unenforceable either in whole or in part	17
C. The Kentucky Supreme Court's interpretation of the powers of attorney do not constitute an obstacle to the formation of an arbitration agreement	20

TABLE OF CONTENTS – Continued

Page

II. The Kentucky Supreme Court's decision below announced rules for interpreting and construing powers of attorney in Kentucky; it did not announce a rule of contract law 25

A. In Kentucky, powers of attorney are limited in their authority by the intentions of the principals 27

B. In Kentucky, powers of attorney do not encompass every plausible transaction under a literal reading of their language 28

C. In Kentucky, the reasonable expectations of language used in a power of attorney are determined in part with reference to the Kentucky Constitution 32

III. The Kentucky Supreme Court is the final authority for the meaning of Kentucky legal language 37

IV. Kindred's construction of the Federal Arbitration Act would render it unconstitutional, as a violation of the Doctrine of Separation of Powers 40

V. By extension of Kindred's desired rule, the State law of agency will be federalized any time there arguably exists Congressional policy favoring or disfavoring anything 43

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995) 44

American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013) 24

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) ..... *passim*

Baker v. LeBoeuf, Lamb, Leiby and MacRae, 1993 WL 662352 (S.D. Ohio) 29

Brown v. Pro Football, Inc., 518 U.S. 231 (1996) 43

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) 16

California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987) 44

Clinton v. Hibbs' Ex'x, 259 S.W. 356 (Ky. 1924) 3, 27

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) 1

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1974) 13, 20

DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463 (2016) 13, 18, 19, 40

Doctor's Associates v. Casarotto, 517 U.S. 681 (1996) 19, 21, 22

Donna Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012) 7, 8, 11, 27, 36

Duncan v. Walker, 533 U.S. 167 (2001) 46

TABLE OF AUTHORITIES – Continued

Page

Edwards v. Kearzey, 96 U.S. 595 (1877) 16

Gabby v. Roberts, 35 S.W.2d 284 (Ky. 1931) 27

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 13

Harding v. Kentucky River Hardwood Co., 265 S.W. 429 (Ky. 1924) 27, 35

Hathaway v. Eckerle, 336 S.W.3d 83 (Ky. 2011) 25

Kindred Healthcare, Inc. v. Henson, 481 S.W.3d 825 (Ky. Ct. App. 2014) 27

Louisville Peterbilt, Inc. v. Cox, 132 S.W.3d 850 (Ky. 2004) 25

LP Pikeville, LLC v. Wright, 2014 WL 1345293 (Ky. Ct. App. 2014) 37, 38

Marmet Health Care Center, Inc. v. Brown, 132 S.Ct. 1201 (2012) 21

Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990) 43

Mill Street Church of Christ v. Hogan, 785 S.W.2d 263 (Ky. Ct. App. 1990) 27

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 26

New York v. United States, 505 U.S. 144 (1992) 41

Preseault v. I.C.C., 494 U.S. 1 (1990) 44

Preston v. Henning, 69 Ky. (6 Bush) 556 (Ky. 1869) 3

TABLE OF AUTHORITIES – Continued

Page

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 16, 21

Qualitex Co. v. Jacobson Products Co., 514 U.S. 159 (1995) 43

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 3

R.A.V. v. St. Paul, 505 U.S. 377 (1992) 39

Rice v. Floyd, 768 S.W.2d 57 (Ky. 1989) 31

Rodriguez v. United States, 480 U.S. 522 (1987) 24

Saturn Distribution Corp. v. Williams, 905 F.2d 719 (4th Cir. 1990) 20, 21

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 13, 28

Schnuerle v. Insight Communications Company, L.P., 376 S.W.3d 561 (Ky. 2012) 25

Silverman v. Browning, 414 F.Supp. 80 (D.C.Conn. 1976) 41

Silverman v. Browning, 429 U.S. 876 (1976) 41

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) 24

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 46

Turner v. Safley, 482 U.S. 78 (1987) 30

U.S. v. Klein, 80 U.S. (13 Wall.) 128 (1871) 41, 42

U.S. v. Gainey, 380 U.S. 63 (1965) 42

TABLE OF AUTHORITIES – Continued

Page

U.S. Fidelity Co. v. McGinnis, 147 Ky. 781, 145 S.W. 1112 (1912) 35

Welsh v. U.S., 398 U.S. 333 (1970) 43

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 39

U.S. CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. X 41

STATUTES

9 U.S.C. § 2 ..... *passim*

9 U.S.C. § 4 ..... *passim*

28 U.S.C. § 1257(a) 1

COLO. REV. STAT. § 14-2-109 (West 2016) 30

KY. REV. STAT. § 387.660 38

KY. REV. STAT. § 411.130 9

MONT. CODE ANN. § 27-5-114 (1996) 19

MONT. CODE ANN. § 40-1-301 (2016) 30

TABLE OF AUTHORITIES – Continued

Page

STATUTORY MATERIALS

Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce among the States or Territories or with Foreign Nations: Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary, 68th Cong. 10, 17 (1924) 44, 45

OTHER AUTHORITIES

RESTATEMENT (SECOND) CONFLICT OF LAWS § 292(2) (1971) 14

RESTATEMENT (SECOND) OF AGENCY § 34 31

RESTATEMENT (THIRD) OF AGENCY § 2.02 ..... 7, 28

UNIF. POWER OF ATTORNEY ACT § 107 14

UNIF. POWER OF ATTORNEY ACT § 203 14

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288-290 (1921) (federal question exists where a State court's application of the State law of decision is premised upon a finding of fact that has the effect of excluding the application of federal law).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4 of the FAA, 9 U.S.C. § 4, provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition * * * for an order directing that such

> arbitration proceed in the manner provided for in such agreement. * * * If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT OF THE CASE

In the case below, the Kentucky Supreme Court interpreted and construed the two powers of attorney at issue as not encompassing the authority for the

agents to enter into pre-dispute arbitration agreements on behalf of their respective principals. This characterization of the lower court's action is in fact the characterization that the Kentucky Supreme Court gave its decision. This Court will accept this characterization as true if the characterization does not constitute mere subterfuge to obtain a result in evasion of federal law. *Cf. Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945) ("[I]t is not for us to consider the correctness of the non-federal ground unless it is an obvious subterfuge to evade consideration of a federal issue.").

The principals in this case were nursing home residents of a single nursing home, and the agents were family members of the respective principal. The underlying disputes in each case below involve allegations of personal injury and nursing home abuse.

In one power of attorney, the Kentucky Supreme Court held that the plain language of the instrument did not encompass the authority. In the other power of attorney, while the court determined that the literal language of the instrument plausibly encompassed the authority, the court held that the principal's intent to grant this authority could not be reasonably inferred from the language of the instrument.[1]

---

[1] In Kentucky, determination of the intent encompassed in a power of attorney is a matter of law, and a matter for the courts. *Preston v. Henning*, 69 Ky. (6 Bush) 556 (Ky. 1869); *see also Clinton v. Hibbs' Ex'x*, 259 S.W. 356, 357-358 (Ky. 1924) (question of principal's intent a matter for the court and not a jury).

I. FACTUAL BACKGROUND

Both cases involved in this petition stem out of allegations of nursing home abuse of members of the Respondents' family (nursing home residents Joe Wellner and Olive Clark), committed by Petitioners ("Kindred") and their nursing home facility, Winchester Centre for Health and Rehabilitation (a/k/a Fountain Circle Health and Rehabilitation Center). It was alleged, and was taken as fact by the Kentucky Supreme Court below, that at the time of Joe Wellner and Olive Clark's admissions to Fountain Circle Health and Rehabilitation Center, the nursing home residents' respective attorneys in fact executed a separate pre-dispute arbitration agreement on behalf of each resident, ostensibly pursuant to written powers of attorney. Pet. App. 6-7. These arbitration agreements themselves "provided that all claims and controversies arising from the agreement or the resident's stay at the facility, including contract, tort, breach of statutory duties and other causes of action would be resolved under the agreement." Pet. App. 57. These agreements were optional, *i.e.*, they were neither a condition of admission nor a condition for the provision of health care at Kindred's facility. Pet. App. 17, 20.

Joe P. Wellner was a resident of Fountain Circle Health and Rehabilitation Center from August 16, 2008 until June 15, 2009, dying on June 19, 2009. Respondent Beverly Wellner, on behalf of the Estate of her husband and on behalf of his wrongful death beneficiaries, alleged in a Complaint in the Circuit Court for Clark County, Kentucky, that Joe Wellner sustained

numerous injuries at Kindred's facility, including falls; dehydration and malnutrition; pressure sores; infections; and improper wound care.

Olive Clark was a resident at this same Fountain Circle Health and Rehabilitation Center from August 16, 2008 until March 30, 2009, dying on April 4, 2009. While she was a resident in Kindred's facility, it is alleged that Olive Clark also sustained numerous injuries, including falls; dehydration; skin breakdown; infections; and medication errors. Respondent Janis Clark, on behalf of the Estate of her mother and on behalf of her wrongful death beneficiaries, filed a Complaint against Kindred in the Circuit Court for Clark County, Kentucky.

The Wellner power of attorney provided in pertinent part:

> 1. To receive, take receipt for, and hold in possession, manage and control all property, both real and personal, which I now or may hereafter own, hold, possess or be or become entitled to with full power to sell, mortgage or pledge, assign, transfer, invest and reinvest the same or any part thereof in forms of investment, including bonds, notes and other obligations of the United States deemed prudent by my said son in his discretion, with full power to retain the same without liability for loss or depreciation thereof.
>
> 2. To demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be

> or become due to me (including the right to institute legal proceedings therefor).
>
> 3. To make, execute, deliver and endorse notes, drafts, checks and order for the payment of money or other property from or to me or order in my name.
>
> 4. To, make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance.

Pet. App. 21-23. The Clark power of attorney provided in pertinent part:

> I, OLIVE G. CLARK . . . hereby constitute and appoint . . . my true and lawful attorney in fact, with full power for me and in my name, place, and stead, in her sole discretion, to transact, handle, dispose of all matters affecting me and/or my estate in any possible way.
>
> Without limiting or derogating from this general power, I specifically authorize my attorney in fact for me and in my name, place, and stead, in her sole discretion:
>
> * * *
>
> To draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds or agreements;
>
> * * *
>
> To institute or defend suits concerning my property or rights;

* * *

> Generally to do and perform for me and in my name all that I might do if present.

Pet. App. 18-19.

II. PROCEEDINGS BELOW

Upon motions filed in each case to compel arbitration, the Clark County Circuit Court initially ordered enforcement. However, the Kentucky Supreme Court subsequently entered a decision in the case of *Donna Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), *cert. denied*, 133 S.Ct. 1996 (2013), and Respondents moved for reconsideration.

In *Ping*, the Kentucky Supreme Court held that a power of attorney which does not contain an authorization for dispute resolution, does not encompass the power to execute an arbitration agreement. *Ping*, 376 S.W.3d at 593-594. Additionally, *Ping* specifically quoted the RESTATEMENT (THIRD) OF AGENCY § 2.02 (comment h. (2006)), which states that there are "[t]hree types of acts [that] should lead a reasonable agent to believe that the principal does not intend to authorize the agent to do the act." *Ping* at 593. These acts by the agent "will impose on the principal" unforeseen "consequences" such that the authority to engage in those acts will not be inferred. *Id.*; Pet. App. 27-28, 122-124. One category of acts are those that "create legal consequences" "significant and separate" from the primary transactions, having "major legal implications for the principal, such as granting a security interest

in the principal's property or executing an instrument confessing judgment." *Ping* at 593; Pet. App. 28 n. 10. The Kentucky Supreme Court in *Ping* held that "[w]e would place in this . . . category of acts with significant legal consequences a collateral agreement to waive the principal's right to seek redress of grievances in a court of law." *Ping* at 593. That court concluded, "[n]othing in Mrs. Duncan's power of attorney suggests her intent that Ms. Ping make such waivers on her behalf." *Id.*

Upon the precedent of *Ping*, the Clark County Circuit Court vacated its earlier orders granting the motions to compel arbitration, substituting therefor orders denying those motions. Pet. App. 126-127, 138-139. In each instance, the Circuit Court reached its decision premised upon absence of sufficient transactional authority in the respective power of attorney.

Kindred then filed motions for interlocutory relief in the Court of Appeals of Kentucky. Given the Kentucky Supreme Court's decision in *Ping v. Beverly Enterprises*, *see supra*, and the reliance of *Ping* upon the RESTATEMENT OF AGENCY, the Kentucky Court of Appeals denied relief. Pet. App. 121-125, 131-137.

Kindred next appealed to the Kentucky Supreme Court. Not surprisingly, the Kentucky Supreme Court interpreted the powers of attorney differently from one another, based upon their respective verbiage. The Kentucky Supreme Court's resulting opinion

was directed to interpreting the meaning and effect of the words in the powers of attorney.[2]

The Kentucky Supreme Court's reading of the Wellner power of attorney was straightforward. The Wellner power of attorney simply did not contain language even plausibly encompassing the arbitration agreement. The Wellner power of attorney included language granting the attorney-in-fact some authority over Joe Wellner's legal affairs, and language granting the power to contract regarding property. However, the Kentucky Supreme Court concluded that the instrument language that included "the right to institute legal proceedings" to recover money was insufficient because, self-evidently, executing a pre-dispute arbitration agreement is not the institution of any kind of legal proceeding. Pet. App. 35-36. As to the verbiage granting power to execute property contracts, while a chose-in-action is property under Kentucky law, the arbitration contract was fundamentally an exchange involving the parties' rights, rather than an exchange with reference to their property. The principal would not understand execution of a pre-dispute arbitration contract to be a property transaction, and the

---

[2] Additionally, the lower court held (as it had in the past) that, pursuant to Kentucky's wrongful death statute, KY. REV. STAT. § 411.130, decedents do not have the authority to bind their wrongful death beneficiaries to arbitrate a wrongful death claim. Pet. App. 8-12. Under KY. REV. STAT. § 411.130, the decedent has neither a legal nor an equitable interest in the wrongful death claim. Kindred does not challenge this aspect of the court's ruling.

Kentucky Supreme Court concluded that this language was likewise insufficient on its face. Pet. App. 36-38.

The Kentucky Supreme Court determined that the Clark power of attorney did plausibly encompass the power to execute the pre-dispute arbitration contract on behalf of the principal, given the instrument's broad language. The instrument's language grants the attorney-in-fact power "to do and perform for me and in my name all that I might do if present," as well as granting general authority to execute contracts. Nonetheless, the Kentucky Supreme Court determined that it was not objectively reasonable to interpret the Clark instrument's language as including the agency power to execute pre-dispute arbitration contracts on behalf of the principal. Pet. App. 38-39. The Kentucky Supreme Court took the position that the meaning of a Kentucky power of attorney is not determined by the broadest possible inferences that can be drawn from its words; rather, a Kentucky power of attorney's meaning derives from the readable intentions of the principal. Pet. App. 39. A universal but generally-worded grant of agency was insufficient to demonstrate that the principal had manifested the intention for the attorney-in-fact to have the power to enter into pre-dispute arbitration agreements.

The Kentucky Supreme Court considered the Kentucky Constitution's characterization of the right to trial to inform the principal's reasonable expectations of the meaning of language in Kentucky instruments. Pet. App. 41-43. The Kentucky citizen-principal, being

master over his or her own legal affairs, does not evince an intention for an agent to have the ability to remove that principal from the judicial system vis-à-vis another party, in an irrevocable and unbreakable perpetual agreement, unless the principal specifically grants the agent this power. *See* Pet. App. 43.

There were two Dissenting Opinions. Justice Abramson (now Hughes) wrote one Dissent, joined by Chief Justice Minton and Justice Noble. Justice Abramson had authored the *Ping* Opinion, and she attempted to distinguish its circumstances from those of Wellner and Clark. *See* Pet. App. 84.

Justice Noble also wrote a Dissent, joined by Chief Justice Minton. She wrote separately to emphasize what she considered to be a general error in the Kentucky Supreme Court's power of attorney jurisprudence. She contended that the Kentucky Supreme Court was in effect erroneously converting general powers of attorney into specific powers of attorney by limiting general powers of attorney to the illustrative powers recited in the instrument. Pet. App. 109, 111-112.

SUMMARY OF ARGUMENT

Neither Olive Clark nor Joe Wellner signed the Arbitration Agreements in question. So, at the end of the day, some court is going to have the final say in interpreting and construing the Wellner and Clark powers of attorney. Even Kindred cannot avoid this

proposition. The court having the final say on these powers of attorney interpretations should be the Supreme Court of Kentucky.

The Question Presented by Kindred mischaracterizes the nature of the lower court's decision. The Kentucky Supreme Court did not announce a rule of contract law. Nor did it interpret a contract. Rather, the Kentucky Supreme Court applied rules determining the intentions of the principals in this case.

The Kentucky Supreme Court confirmed that Kentucky powers of attorney are affirmative grants of authority, conferring only those powers the principal would expect to flow from the language used in the instrument. The Kentucky Supreme Court took the Kentucky Constitution as one gauge of the reasonable expectations of a principal with regard to language used. The State Constitution assigns special significance to the trial rights of Kentucky citizens. Thus, because the State Constitution assigns this significance, the Kentucky Supreme Court held that a principal in Kentucky does not expect that an agent would be able to waive the principal's trial rights pre-dispute, without such power specifically set forth in the instrument.

On its face, the FAA does not exist to make arbitration contracts easier to form, and it does not preempt State law regarding issues of contract formation. "[The] purpose [of the FAA] was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place

arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (*citing Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220, and n. 6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, n. 4 (1974)). The FAA exists to ensure that arbitration agreements are as enforceable as any other contract and preempts State law that stands as an obstacle to enforcing arbitration contracts as written. However, requiring proper authority of an agent to execute a contract on another's behalf is a question of contract formation, and is no obstacle. If the FAA could preempt any need for specificity in a power of attorney regarding arbitration, then it could theoretically preempt the need for any particular requirement of language at all. Such a result would be overreach. Powers of attorney are the creatures of their principals, and not creatures of legislative policy.

Because the scope of an agent's authority is a matter of interpretation of the intentions and expectations of the principal, Kindred's proposed novel construction of the FAA here would run afoul of the Separation of Powers doctrine. The FAA preempts State law rules that operate to render an arbitration agreement unenforceable, *see, e.g.*, *DIRECTV v. Imburgia*, *infra*. The FAA cannot preempt a State court's determinations of a principal's intentions in a document.

Adoption of Kindred's construction of the FAA would have long-reaching ramifications. Unlike contract law, the law of agency has not traditionally incorporated public policy considerations. Assuming a

lawful purpose, power of attorney interpretation has confined itself to producing a faithful translation of the intentions of the principal. Partially federalizing American power of attorney law in order to show deference to federal policy choices is unwarranted by the FAA and threatens to federalize generally the State law on agency.

ARGUMENT

Kentucky has not adopted the Uniform Power of Attorney Act, nor any other equivalent statutory scheme. As such, interpretation of Kentucky powers of attorney remains as developed under the Common Law of Kentucky. *Compare with* UNIF. POWER OF ATTORNEY ACT § 203.[3] It is noteworthy, however, that the Uniform Power of Attorney Act provides this:

> The ***meaning*** and ***effect*** of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

UNIF. POWER OF ATTORNEY ACT § 107 (emphasis added); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 292(2) (1971) ("The principal will be held bound by

[3] Section 203 suggests that a grant of contract authority as to a particular subject matter authorizes the agent to enter into pre-dispute arbitration agreements with respect to any dispute involving that subject matter.

the agent's action if he would so be bound under local law of the state where the agent dealt with the third person."). As such, this Court should recognize that the last word on the ***meaning*** and ***effect*** of these, Kentucky powers of attorney, like the last word on the meaning and effect of Kentucky statutes, lies with the Kentucky Supreme Court.

I. The FAA does not reach to the formation issue addressed by the Kentucky Supreme Court's decision below.

9 U.S.C. § 2 explicitly preserves intact certain contract defenses to the enforcement of an arbitration agreement. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) ("§ 2's saving clause preserves generally applicable contract defenses. . . ."). 9 U.S.C. § 4 explains that a U.S. District Court will make an order directing the parties to proceed to arbitration unless that court is persuaded that the making of the agreement is in issue:

> The court shall hear the parties, and upon being satisfied that ***the making of the agreement for arbitration*** or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . .

9 U.S.C. § 4 (emphasis added).

The conditioning phrase, "making of the agreement," in the FAA signifies that those State contract

defenses preserved intact by the FAA include those negating the prima facie showing of a contract. *See* 9 U.S.C. § 4; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 353 (2011) (California's *Discover Bank* rule preempted by FAA because the rule did not pertain to the making of an arbitration agreement) (Thomas, J., *concurring*); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 288 U.S. 395, 412-413 (1967) ("Sections 2 and 3 of the Act assume the existence of a valid contract. They merely provide for enforcement where such a valid contract exists.") (Black, J., *dissenting*). One such preserved defense would be the absence of authority to execute the arbitration contract on behalf of the bound party. *Cf. Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n. 1 (2006) (distinguishing as separate the question of whether an arbitration agreement was "ever concluded," from the question of whether the agreement was void *ab initio* due to illegality).

A. The FAA does not preempt determinations under State law that no agreement ever formed.

A contract is of course, an agreement of minds for an exchange of sufficient consideration. *Edwards v. Kearzey*, 96 U.S. 595, 599-600 (1877). There must exist competent parties and assent for the consideration exchanged. Here, the Kentucky Supreme Court determined that both parties to the contract did not assent, because one of the parties was absent. No prima facie contract.

For statutory rights to vest premised upon the existence of a certain type of contract, it is axiomatic that the contract must first exist. It would be an exercise in circular reasoning to appeal to those rights as the mechanism ***whereby*** the contract arises. That is, whatever Kindred might wish, no statute engenders a contract unilaterally. True, presumptively an arbitration agreement in itself constitutes sufficient consideration. However, a signature on the signature line of a contract does not constitute presumptive assent of the parties to the contract, if the signature is not that of the party to be bound. The burden of demonstrating the authorization of the signature would still exist, and would have to be proven by reference to instruments and facts outside the ambit of the contract, and of the FAA. These facts are in essence a condition precedent for the showing of the contract, notwithstanding a statutory purpose to favor such contracts. Put another way, the *a priori* existence of an arbitration agreement – the agreement being the *sine qua non* for vesting a right to demand federal preemption of State law – cannot arise by virtue of the preemption mechanism.

B. This Court's cases upon which Kindred relies have been directed to provisions of State law rendering arbitration agreements unenforceable either in whole or in part.

In each of the three cases most relied upon by Kindred, enforceability as written, rather than formation, was the issue. In *AT&T Mobility LLC v. Concepcion*,

563 U.S. 333 (2011), an arbitration clause in a consumer contract in California included a class action waiver. Yet, California law prohibited just such waivers in the context of consumer contracts of adhesion (California's *Discover Bank* rule), and, as such, the U.S. Court of Appeals for the Ninth Circuit found the arbitration clause unconscionable and unenforceable. This Court reversed, holding that the *Discover Bank* rule, as applied to arbitration agreements, would have a disproportionate impact on arbitration and was thus preempted by the FAA. The formation of the agreement was not in issue. Rather, *Concepcion* involved solely a question of whether an agreement would be enforced as written.

In *DIRECTV v. Imburgia*, 136 S.Ct. 463 (2016), the defendant media corporation provided a form contract to its California consumers, and, like the contract in *Concepcion*, it included an arbitration clause excluding class action arbitration. The clause was conditioned, however, on the availability, *i.e.*, the viability, of the class action waiver. Per the terms of the clause, if local law refused to enforce the class action waiver, then the arbitration clause itself would not be enforced. Post-*Concepcion*, the condition for revoking the arbitration clause could only be triggered if the lower court imported defunct law (California's *Discover Bank* rule) into the contract. The California appellate court did just that, holding that the arbitration clause was unenforceable because the law at the time of the contract's inception included the *Discover Bank* rule.

This Court reversed and remanded, holding that any California contract rule that imported defunct law into a contract having the effect of rendering an arbitration agreement unenforceable, was preempted by the FAA. Again, the formation of the agreement was not in issue – only its enforceability. "[T]he contract refers to 'state law' that makes the waiver of class arbitration 'unenforceable,' while an invalid state law would not make a contractual provision unenforceable." *DIRECTV v. Imburgia*, 136 S.Ct. at 469.

Finally, in *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996), the Montana statute at issue provided in a subsection (now repealed):

> (4) Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, ***the contract*** may not be subject to arbitration.

MONT. CODE ANN. § 27-5-114 (1996) (emphasis added). Again, this is an issue of enforceability. Thus, the Montana statute on its face assumed the prima facie existence of the contract. In sum, every instance cited by Kindred as authority for FAA preemption involved an existing prima facie arbitration contract, and a State court or State law refusing to enforce that contract as written, and is therefore distinguishable from the case at hand.

C. The Kentucky Supreme Court's interpretation of the powers of attorney do not constitute an obstacle to the formation of an arbitration agreement.

Kindred goes on to argue that the FAA also preempts any State law prohibiting, or acting as an obstacle to, the prima facie ***formation*** of arbitration contracts. Kindred implicitly relies upon a broad proposition from *Concepcion* for this argument.

> Although § 2's saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as ***an obstacle*** to the accomplishment of the FAA's objectives. *Cf. Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 120 S.Ct. 1913, 146 L.Ed.2d 914. The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.

AT&T Mobility LLC v. Concepcion, 563 U.S. at 334 (emphasis added); *see also Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990) (holding via declaratory judgment, a Virginia law prohibiting the inclusion of arbitration clauses in automobile dealer contracts preempted by the FAA).

Assuming *arguendo* that the FAA does reach to formation as well as enforceability issues,[4] the Kentucky

---

[4] Again, the purpose of the FAA is to reverse "the judiciary's longstanding refusal to enforce agreements to arbitrate," *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 219-220, and "to make

Supreme Court's decision is still not an "obstacle." Certainly the "obstacle" here is neither one of statutory law, *e.g.*, the circumstance found in *Saturn Distribution Corp. Williams*, *supra*, nor is it a categorical prohibition of pre-dispute arbitration agreements in certain contexts, *see Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012) (vacating and remanding a West Virginia Supreme Court decision opining that the FAA was never intended to apply to personal injury actions and that public policy precluded enforcing arbitration agreements in certain circumstances). The decision below is an interpretation of what the principal meant in an instrument appointing an agent.

Kindred argues at length that the Kentucky Supreme Court's interpretive decision below operates as an "obstacle," in exactly the same manner as the Montana statute at issue in *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996). Not so.

In *Casarotto*, Montana required arbitration clauses in adhesion contracts to be set out distinctively from other clauses in the contract. The Montana law at root was ostensibly engineered to ensure assent of the parties to arbitration clauses, and assumed that an arbitration clause might be a provision unexpected by an unsophisticated party assenting to the contract. In Kindred's view, the Kentucky Supreme Court has likewise created "an explicit-reference requirement that is

---

arbitration agreements as enforceable as other contracts, but not more so," *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. at 406 n. 12. Thus, an obstacle to the formation of an arbitration agreement is not an obstacle for the purposes of the FAA.

not applicable to other kinds of contracts," Pet. Br. *passim*, apparently for the purpose of double checking the assent of the parties.

Yet, the analogy to *Casarotto* fails structurally. The contract at issue in *Casarotto* undoubtedly contained explicit language regarding arbitration. It did not, to use a hypothetical example for contrast, provide language for arbitration only plausibly, *e.g.*, "the parties agree that they will engage in timely and efficient resolution of disputes involving this contract." Yet, this hypothetical language would perhaps be the closest analogue to the circumstance faced by the Kentucky Supreme Court below.[5] Conversely, the Kentucky court's decision here did not require special execution rules for power of attorney language conveying authority over pre-dispute arbitration agreements. Unlike *Casarotto*, the Kentucky Supreme Court did not require additional signatures, special fonts, or special notarization of arbitration language in a power of attorney or of the power of attorney as a whole. Additionally, Montana placed its demand upon the arbitration agreement itself, and it did so as a (legislative) mandate, rather than as an interpretation of the intentions of a contracting party.

These structural points notwithstanding, the seminal distinction between the circumstances is this: The Montana statute served to encumber arbitration and placed arbitration provisions in a contract in a suspect status. The Kentucky Supreme Court's interpretive

---

[5] Such hypothetical language would plausibly mandate arbitration, but it does not explicitly mandate arbitration.

rules do no such thing. The lower court merely requires that language directed to arbitration be included in the power of attorney demonstrating that arbitration had been contemplated.

In order for a power of attorney to include agency power to execute pre-dispute arbitration agreements, presumably ***some kind of language*** is going to be required in the instrument to permit the reading-in of such a power. As such, designating that language cannot be an encumbrance.

Yet Kindred calls it an encumbrance. Self-evidently, Kindred wants the acceptable language to be more ambiguous. But why should a party prefer more ambiguous language over less ambiguous language in the customer's power of attorney, unless the party wished to foster inadvertently-concluded contracts?

There is no evidence in the FAA to suggest that this is the Congressional purpose. Setting aside the complete absence of Congressional statutory history for such an adventure, the FAA on its face simply does not exist to influence extrinsic instruments and mechanisms of agency, *e.g.*, powers of attorney, corporate bylaws, State guardianship schemes, etc. It certainly does not exist to compel arbitration through displacing a court's interpretive function applied to agency mechanisms. *See argument infra*. Should this Court take the position that, unless otherwise provided, general agents have the innate authority to execute arbitration agreements, this proposition would in effect convert private instruments of agency from creatures of their principals, to retainers of the U.S. Congress and its policies. As this Court is aware, "'no legislation pursues

its purposes at all costs,'" *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013) (*quoting Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987)), not even the Federal Arbitration Act.

This is exactly what one of Kindred's Amici explicitly demands. "In light of the emphatic federal policy in favor of arbitral dispute resolution, a power of attorney that authorizes an attorney-in-fact to enter contracts must unambiguously exclude the authority to enter into arbitration agreements before such an instrument can be held not to convey such authority in a case subject to the FAA." Amicus (American Health Care Association) Br. 4 (emphasis omitted).

While the Amicus proposal might seem to further the objective of encouraging arbitration of disputes, it certainly appears nowhere in a plain reading of the FAA, nor is it implied. Moreover, such a rule flies in the face of this Court's own precedent, requiring arbitration to be ***chosen***. Arbitration is a matter of "consent," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010), *i.e.*, a matter requiring parties' affirmative disposition, and not a matter of "coercion," *id.*, *e.g.*, a default acquiescence created by federal policy rather than the contracting party.

Words must be used in ***choosing*** arbitration by a party, and thus words must be used by a principal in granting an agent the power to ***choose*** arbitration. That the Kentucky Supreme Court has fixed upon the verbiage signaling the intention for an agent to hold

such power – as opposed to fixing upon alternative, vaguer verbiage – is not an obstacle to arbitration. Again, some words are necessarily required. So long as those words are specified with some assurance by the State court, there is no impediment.

II. The Kentucky Supreme Court's decision below announced rules for interpreting and construing powers of attorney in Kentucky; it did not announce a rule of contract law.

If the Kentucky Supreme Court had found sufficient agency in the Clark and Wellner powers of attorney, it would have enforced the arbitration agreements as written.

> There is no dispute that if the arbitration agreements were validly formed, they are enforceable as written under both the Kentucky Uniform Arbitration Act (KUAA), KRS 417.050 et seq., and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq., at least with respect to the decedents' claims for personal injury and statutory violations.

Pet. App. 24; *see also Schnuerle v. Insight Communications Company, L.P.*, 376 S.W.3d 561 (Ky. 2012) (enforcing arbitration agreement in context of consumer internet service agreement); *Hathaway v. Eckerle*, 336 S.W.3d 83 (Ky. 2011) (enforcing arbitration agreement in context of automobile purchaser's dispute with auto dealership); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 855 (Ky. 2004) ("'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of

arbitration. . . .'") (*quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983)).

Again, there are two different powers of attorney at issue in this case, and they apply distinctive language, and different grants of agency. The lower court held that it would not interpret the Wellner power of attorney as encompassing the power to execute pre-dispute arbitration contracts because the language used reaching to (1) power over legal affairs, and to (2) power to execute property contracts, did not reach the arbitration contract. The power to "institute legal proceedings" does not encompass the power to promise another party, pre-dispute, never to sue in court. And power to execute property transactions is not ordinarily understood as power to waive litigation rights generally, vis-à-vis another party.

With respect to the Clark power of attorney, the lower court announced common sense interpretive rules for Kentucky powers of attorney, and for determining agency relationships, and applied these rules. First, Kentucky powers of attorney are empowered only to reflect the intent of the principal. Under Kentucky law, all powers of attorney are interpreted in accordance with "the age-old principle that a power of attorney must be strictly construed in conformity with the principal's purpose." Pet. App. 28. Second, it is not reasonable to read all possible powers encompassed by the language of a power of attorney as powers intended by the principal. It is reasonable to expect that some powers are spelled out. Third, one source of guidance

for interpreting Kentucky powers of attorney, and determining the reasonable expectations of the principal as to legal language, is the Kentucky Constitution.

A. In Kentucky, powers of attorney are limited in their authority by the intentions of the principals.

Agency in Kentucky, as elsewhere, is something which must be proved up. *See Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky. Ct. App. 1990) (burden to establish Agency is upon the proponent thereof). According to the Kentucky Supreme Court, Kentucky powers of attorney are strictly construed, *Ping v. Beverly Enterprises*, 376 S.W.3d 581 (Ky. 2012); *see also Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429 (Ky. 1924), giving effect only to the purposes of the principal. *See Clinton v. Hibbs' Ex'x*, 259 S.W. 356, 357-358 (Ky. 1924) (agent's authority to conduct all business and execute all notes, at the agent's discretion, held not to encompass the power to bind the principal as surety). Under Kentucky law "[a]ctual authority arises from a direct, ***intentional*** granting of specific authority from a principal to an agent." *Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 830 (Ky. Ct. App. 2014) (*citing Mill Street Church of Christ v. Hogan, supra*) (emphasis added). "In construing the writing, the intent of the [principal and agent] must be ascertained and given effect. 2 C. J. 555." *Gabby v. Roberts*, 35 S.W.2d 284, 285 (Ky. 1931).

B. In Kentucky, powers of attorney do not encompass every plausible transaction under a literal reading of their language.

The Common Law recognizes a limitation to the reasonable expectation of language in a power of attorney with regard to transactions having consequences not apparently contemplated by the principal.

> [S]ome acts that are otherwise legal create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal. A reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment. In such circumstances, it would be reasonable for the agent to consider whether a person in the principal's situation, having the principal's interests and objectives, would be likely to anticipate that the agent would commit such a collateral act, given the nature of the principal's specific direction to the agent.

RESTATEMENT (THIRD) OF AGENCY § 2.02 comment h. (2006). It would be reasonable for any power over these collateral acts, or acts that have collateral effects, to be spelled out in the power of attorney.

Even where arbitration clauses are viewed as merely forum selection clauses, *see Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to

arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause."), this limitation applies. For example, should a forum selection clause provide that a Kentucky resident permanently select a jurisdiction other than that of Kentucky for future disputes between parties, *e.g.*, that of neighboring Ohio, the Common Law would logically require the power of attorney to specifically spell out the agent's authority on this matter. *See, e.g.*, *Baker v. LeBoeuf, Lamb, Leiby and MacRae*, 1993 WL 662352 *9 (S.D. Ohio) (where the U.S. District Court demanded that a power of attorney contain a forum selection authorization before a principal would be bound by an agent's agreement to litigate dispute in England).

There is a limit to the powers which Kentucky courts will infer into a general power of attorney. This is true even when the transaction contemplated is completely lawful and may in fact be in the principal's best interests. The Kentucky Supreme Court found it easiest to illustrate this point by referencing the most extreme of examples. As the Kentucky Supreme Court explained below,

> [i]t would be strange, indeed, if we were to infer, for example, that an attorney-in-fact with the authority "to do and perform for me in my name all that I might if present to make any contracts or agreements that I might make if present" could enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption;

> consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude. It would, of course, be absurd to infer such audacious powers from a non-specific, general, even universal, grant of authority.

Pet. App. 42.

The lower court's list may appear at first blush to be a "parade of horribles" as the Dissent below claimed. But such an appearance would be misleading. Arbitration is not being likened to consenting to an abortion, for instance, in terms of the magnitude of the effect on the principal. Rather, these hyperbolic examples are offered simply to prove a point: Some things are not within the reasonable expectations of the principal even if they can be plausibly encompassed by the literal reading of broad language.

For instance, a marriage is a contract, and a principal certainly has the right to marry in person. Marriage is also presumably a favored institution. *See Turner v. Safley*, 482 U.S. 78, 94-96 (1987) (recognizing a Constitutional right of prison inmates to marry). Additionally, marriage by proxy, via power-of-attorney, is also recognized in some U.S. jurisdictions. *See, e.g.*, COLO. REV. STAT. § 14-2-109 (West 2016); MONT. CODE ANN. § 40-1-301 (2016). Nonetheless, strict construction of powers of attorney in Kentucky means that a general power-of-attorney, without more specific language or without some other indicium of such power, would not intrinsically encompass the authority for the agent to marry off the principal. Such a requirement

exhibits neither discrimination against marriage nor serves as an obstacle to it.

That the Kentucky Supreme Court reads limitations into even the most general and universal of powers of attorney is a practice that preceded that court's line of arbitration cases. *See* Pet. App. 43-44 (lower court citing *Rice v. Floyd*, 768 S.W.2d 57, 59 (Ky. 1989) for this proposition). In *Rice v. Floyd*, without elaborating, the Kentucky Supreme Court announced that even the broadest power of attorney would not have all the authority a guardian might have. *Rice*, 768 S.W.2d at 59 (Ky. 1989) ("The scope of authority, duties and accountability of a guardian is much broader than that of a traditional power of attorney, even one intended to survive disability."). As explained by the Common Law,

> [i]t is because formal instruments are subjected to careful scrutiny that it is frequently said that they must be "strictly" construed. In fact, of course, they are construed so as to carry out the intent of the principal. * * * All-embracing expressions are discounted or discarded. Thus, phrases like "as sufficiently in all respects as we ourselves could do personally in the premises," "as the said agent shall deem most advantageous," "hereby ratifying and confirming whatever our agent shall do in the premises" are disregarded as meaningless verbiage.

RESTATEMENT (SECOND) OF AGENCY § 34 comment h. (2016).

Granting the power to contract may be more than "meaningless verbiage," but this is not to say that such a broad power does not have expected limits, such as in the case of entering into a marriage. The Kentucky Supreme Court is still going to recognize a limit as to what a principal expects of legal language used in Kentucky. One guide to such expectations is the Kentucky Constitution.

C. In Kentucky, the reasonable expectations of language used in a power of attorney are determined in part with reference to the Kentucky Constitution.

An interpreting Kentucky court must have guidance in determining which agency powers require setting out in a power of attorney due to the reasonable expectations of the principal regarding legal language. One such guide is Kentucky's foundational legal document, the Kentucky Constitution.

Kindred essentially makes two claims attacking the lower court's application of the Kentucky Constitution as an interpretive canon. First, Kindred claims that the Kentucky Supreme Court's appeal to the State Constitution constitutes a proscription; and that, with the incorporation of the Kentucky Constitution's understanding of the significance of jury trial rights, the Kentucky Supreme Court effectively signaled a refusal to enforce pre-dispute arbitration agreements. However, this claim is self-evidently incorrect. As the Kentucky Supreme Court explained,

> [w]e simply require, as we do with any contract, that the parties to be bound by the agreement validly assented. Nursing home residents may still enter into pre-dispute arbitration agreements and those agreements will be enforced, like any contract, if the agreement of the persons to be bound thereby has been obtained, either directly in person or by a duly authorized agent. We say only that an agent's authority to waive his principal's constitutional right to access the courts and to trial by jury must be clearly expressed by the principal.

Pet. App. 47.

Kindred's second claim is that, regardless of the reasoning, the Kentucky Supreme Court has explicitly required a heightened manifestation of awareness from a principal that a power of attorney encompasses an agency power to waive civil trial rights pre-dispute. It is not immediately evident why such a requirement should be illegitimate. This point notwithstanding, Kindred's claim actually misconstrues what the lower court has done.

The Kentucky Supreme Court announced what would be a Kentucky principal's reasonable expectations flowing from legal language used in a power of attorney. That is the Kentucky Supreme Court's job. This is not mandating heightened awareness; it is announcing an understanding based upon legal context, in this case a principal and agent operating in Kentucky, under the Kentucky Constitution.

Kindred argues however that the Kentucky Supreme Court's application of the Kentucky Constitution here is selective and in bad faith. Kindred points out that, despite the Kentucky Constitution's protection of the right to hold property, Kentucky courts routinely recognize that Kentucky attorneys in fact have the ability to compromise a principal's "right to acquire and dispose of property." Pet. Br. 26. Kindred cites to Justice Abramson's Dissent for this latter proposition. Pet. App. 93. However, if Respondents understand Kindred correctly, Kindred misstates the reality of Kentucky law. True, Kentucky attorneys in fact ordinarily buy and sell ***particular*** parcels of property. However, waiving the right to acquire and dispose of property generally, vis-à-vis another party, is a totally different matter. Kindred cites no authority for the view that an agent with generally-stated powers to enter into property transactions may waive a principal's ***right to own property***. Indeed, no precedent supports such a radical proposition. The Kentucky Supreme Court did not exhibit bad faith in concluding that the principals here had not contemplated agent power over the transactions in this case.

The Kentucky Supreme Court's holding explicitly affirms that pre-dispute nursing home arbitration agreements are enforceable, and can be executed by properly empowered agents. Kindred makes much of the fact that the lower court divided in this case. Yet, although she joined in Justice Abramson's Dissent, Justice Noble's penned-Dissent highlights the real nature of her disagreement as one directed not toward the reach of the FAA at all, but to the proper interpretation and construction of Kentucky powers of attorney.

> The problem is that the strict-construction rule originated in cases that addressed specific powers of attorney, and held that general language accompanying what was otherwise a specific grant of power should be read strictly so as not to expand the agent's authority beyond that intended by the principal.[6]

Pet. App. 105. That is, Justice Noble believed that the Majority's power of attorney ***interpretation*** was wrong – ***not*** that the Majority's interpretation was correct, but preempted by the FAA. Her criticism was premised upon the history of Kentucky powers of attorney interpretation.

> But in these cases, unlike some we have recently decided, such as *Ping*, we have been dealing with general powers of attorney, usually executed by a person concerned about becoming incapacitated, delegating to the agent the power to manage the person's affairs as a whole. Using the cases laying out the strict-construction rule to support our conclusion in *Ping* has caused confusion with respect to powers of attorney.

Pet. App. 106-107.

---

[6] The Majority stated this: "Kentucky has long recognized that a power of attorney, should be strictly construed in conformity with the principal's purpose. *Harding v. Kentucky River Hardwood Co.*, 205 Ky. 1, 265 S.W. 429, 431 (1924). Consistent with this strict construction, our Court has held that 'powers of attorney delegating authority to perform specific acts, and also containing general words, are limited to the particular acts authorized.' *Id. citing U.S. Fidelity Co. v. McGinnis*, 147 Ky. 781, 145 S.W. 1112 (1912)." Pet. App. 64.

Justice Noble would have used different interpretive tools on the instruments. The Majority's Opinion represented a principled, if in Justice Noble's view mistaken, choice as to how to interpret Kentucky powers of attorney.

Even Justice Abramson's Dissent, joined by Chief Justice Minton and Justice Noble, strongly suggests that her disagreement with the Majority's Opinion was also fundamentally an objection to the Majority's power of attorney interpretation, rather than a belief in FAA preemption. *See* Pet. App. 89 n. 24 (arguing that the Kentucky Constitution's emphasis on trial rights limited to criminal trial rights). Notably, Justice Abramson authored the unanimous Opinion in *Donna Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), *cert. denied*, 133 S.Ct. 1996 (2013), wherein the lower court held that a similar power of attorney did not encompass the power to execute an arbitration agreement akin to those at issue here.

The point is this: The lower court's decision was in its essence an exercise in power of attorney interpretation, even if the Dissent believed that the Majority's interpretation was in error. As such, the only remaining question is whether this interpretation – that is, the principals' intentions in his or her power of attorney – are preempted by the FAA. Self-evidently, the FAA does not reach this far.

III. The Kentucky Supreme Court is the final authority for the meaning of Kentucky legal language.

Kindred proposes that it is "significant that Kentucky law erects no similar barriers to allowing state-appointed guardians – as opposed to attorneys-in-fact – to enter into arbitration agreements on behalf of their wards." Pet. Br. 22. This proposal is a misstep on Kindred's part.

Citing only U.S. District Court cases for this proposition, Kindred overlooks the appellate history of *LP Pikeville, LLC v. Wright*, 2014 WL 1345293 (Ky. Ct. App. 2014). In *Wright*, the Kentucky Court of Appeals determined that Kentucky's guardianship scheme does in fact provide the guardian with the power to execute pre-dispute arbitration agreements on behalf of the ward. However, notably, the Kentucky Supreme Court granted a motion for discretionary review of *Wright*, and the case is pending. That is, Kindred's guardianship proposition, to which they assign so much significance, may in fact be wrong. Kentucky's guardianship statutes might very well not bestow upon guardians the power to execute pre-dispute arbitration agreements.

Moreover, Kindred's analogy raises an interesting point, and provides a different, revealing analogy, regardless of the outcome of the *Wright* case: Who decides the ***meaning*** of Kentucky statutes?

Kentucky's guardianship statutes are arguably ambiguous as to whether they provide the authority

for a guardian to execute arbitration agreements such as those in question here. For instance, KY. REV. STAT. § 387.660 provides in part:

> A guardian of a disabled person shall have the following powers and duties, except as modified by order of the court:
>
> > (4) To act with respect to the ward in a manner which limits the deprivation of civil rights and restricts his personal freedom only to the extent necessary to provide needed care and services to him.

What does such language mean for arbitration authority purposes? In the *Wright* case, the State Supreme Court will determine whether the power to enter into a pre-dispute arbitration agreement on a ward's behalf is a power statutorily authorized to a guardian. This in turn will very likely require that the Kentucky Supreme Court determine the readable intentions of the Kentucky General Assembly. It will also perhaps mean looking to the Kentucky Constitution for guidance as to what the General Assembly meant.

Applying the rule of the Amicus American Health Care Association (a rule also implied by Kindred), this time to the guardianship schema, would mean that, "in light of the emphatic federal policy in favor of arbitral dispute resolution, [any State statutory scheme] that authorizes [a guardian, appointed for whatever party or purpose], to enter contracts must unambiguously

exclude the authority to enter into arbitration agreements before such an instrument can be held not to convey such authority in a case subject to the FAA." Such a rule would be a direction to State Supreme Courts as to how to interpret their respective legislatures' intentions. Yet such a direction would fly in the face of decades of this Court's jurisprudence, and scores of this Court's cases. *See, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) ("There is no doubt that we are bound by a state court's construction of a state statute.") (*citing R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992)).

Determining the ***meaning*** of a State legislature's statutory language – as opposed to the ***permissibility*** of the statute under U.S. Constitutional and federal law – is a task confined to the State Courts. Just as a State Supreme Court fulfills its judicial function by determining ***what the legislature meant***, a State Supreme Court simply fulfills its judicial function by determining ***what the principal meant*** when executing a power of attorney on that State's soil.

Whether or not a State legislature may discriminate against arbitration in its State guardianship statutes is of course a different question. However, presumably a principal, unlike the State legislature, may discriminate against arbitration as much as he or she wants, FAA or no FAA. If so, and if the State Supreme Court is the final word as to the intent and meaning of principals executing instruments, then this is an easy case for affirming the lower court.

IV. Kindred's construction of the Federal Arbitration Act would render it unconstitutional, as a violation of the Doctrine of Separation of Powers.

The long-established Constitutionality of the FAA is not in question in this case. Nonetheless, Kindred and their Amici propose a novel, unnecessary, and unwarranted construction of the FAA, a construction that would render it unconstitutional. Being a matter of interpretation of intent through analysis of legal language – in essence fact-finding as a matter of law – it would be a violation of the Doctrine of Separation of Powers for Congress to legislate federal preemption in the manner advocated by Kindred and their Amici.

Interpreting a power of attorney is a matter of determining a principal's intentions. It is not a matter of determining State law. By way of contrast, in *DIRECTV v. Imburgia*, this Court specifically noted that the lower California court had acted to interpret ***California contract law***, rather than the intentions of the parties. "The Court of Appeal did not explain why parties might generally intend the words 'law of your state' to encompass 'invalid law of your state.'" *DIRECTV v. Imburgia*, 136 S.Ct. 463, 469. If the California court's decision had been based upon a finding that the parties had indeed intended for the words "law of your state" to include invalidated State law, the result in *DIRECTV* would have been different.

Presumably the Separation of Powers doctrine protects State as well as federal judicial determinations. *See* U.S. CONST. amend. X; *see also Silverman v. Browning*, 429 U.S. 876 (1976) (*affirming Silverman v. Browning*, 414 F.Supp. 80 (D.C.Conn. 1976) (absent proof of prejudice or abuse of discretion, State courts must be permitted to exercise their judicial functions freely)). Certainly Congress has no ability to simply instrumentalize State courts and change their nature. *Cf. New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

Legislatures create substantive power. They do not have the power to tell the judiciary how to rule on a circumstance in front of a court. *U.S. v. Klein*, 80 U.S. (13 Wall.) 128 (1871). This Constitutional rule distinguishes between legislation directing how a court should rule, from a legislature creating new substantive law that happens to affect judicial determinations. *Id.* at 146-147. As this Court has noted,

> [n]o arbitrary rule of decision was prescribed in [*Pennsylvania v. Wheeling Bridge Company*, 59 U.S. 421 (1855)], but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Id.

While it is permissible for legislatures to direct an inference which can reasonably be drawn from a given set of facts, *see U.S. v. Gainey*, 380 U.S. 63, 67 (1965) (statute authorizing the drawing of an inference from a defendant's unexplained presence at an illegal moonshine still was constitutionally permissible as there is a rational connection between the facts proven and the ultimate fact inferred), here there is no such rational connection. To the contrary, Kindred contends that the inference of agency power must be assumed simply by virtue of its convenience to a federally-prescribed preference for arbitration. Legislating this kind of inference is Constitutionally impermissible. Congress cannot tell State courts how to find facts, nor how to interpret documents, unless there is a very clear logical inference that can be made between the facts and the mandated interpretation. Here, the legislative inference has been justified solely because of convenience to a federal policy favoring arbitration, not because of logic.

This Court should not assume, as Kindred apparently does, that the U.S. Congress intended such unconstitutional results. "It is, of course, desirable to salvage by construction legislative enactments whenever there is good reason to believe that Congress did not intend to legislate consequences that are

unconstitutional." *Welsh v. U.S.*, 398 U.S. 333, 355 (1970) (Harlan, J., *concurring*). Federal preemption is not triggered here because it is both unnecessary and illogical, and to do so would be a violation of the Separation of Powers doctrine.

V. By extension of Kindred's desired rule, the State law of agency will be federalized any time there arguably exists Congressional policy favoring or disfavoring anything.

Kindred and their Amici have periodically anchored their argument for federal preemption not simply on a perceived animus against arbitration, but on the simple fact that arbitration is a mode of dispute resolution favored by Congress. Kindred's argument thus portends federalizing all sorts of State law determinations regarding agency and authority, including both the reach of State guardianship statutes and the interpretation of State corporate laws, as they pertain to agency authority to enter into arbitration agreements. Moreover, encouraging arbitration is not the only Congressional policy that has been recognized by this Court, and, indeed, the list of activities and transactions that have been favored by Congress at one time or another is lengthy. *See, e.g.*, *Brown v. Pro Football, Inc.*, 518 U.S. 231, 253 (1996) (Congress seeks to encourage and protect the collective bargaining process); *see also Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 164-165 (1995) (Congress seeks to foster commercial competition, and to encourage technical invention); *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547,

572 (1990) (Congress has expressed a preference for expanding minority ownership of telecommunications licenses); *Preseault v. I.C.C.*, 494 U.S. 1, 3 (1990) (Congress has sought to encourage the development of recreational hiking trails on unused railroad tracks holding right-of-way via eminent domain); *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 595 n. 1 (1987) (Congress has sought to encourage development of mineral resources). Kindred's proposed rule threatens to begin down the slope of federalizing the State law of agency to a large extent.

Furthermore, if the Kentucky Supreme Court's interpretation of an agency instrument is subject to federal preemption, this opens up the proposition that factual determinations as to "the making of the agreement" could be preempted as well. This result would not be faithful to the intent of the FAA, which is simply to reverse the hostility of American courts to the enforcement of private arbitration agreements, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). Indeed, if "the making of the agreement for arbitration" is in issue, 9 U.S.C. § 4 includes the provision of a jury trial.

Presumably a jury trial might be had on the issue of assent, including the intentions of the parties. As one of the drafters of the federal statute in 1925,[7] Mr.

---

[7] *See Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce among the States or Territories or with Foreign Nations: Hearings on S. 1005 and H.R. 646*

Julius Henry Cohen, General Counsel for the New York State Chamber of Commerce, stated in response to questioning by the Joint Subcommittees of the Committees on the Judiciary,

> [t]he one constitutional provision we have got is that you have a right of trial by jury. But you can waive that. And you can do that in advance. Ah, but the question whether you waive it or not depends on whether that is your signature to the paper, ***or whether you authorized that signature***, or whether the paper is a valid paper or not, whether it was delivered properly. ***So there is a question there which you have not waived the right of trial by jury on.***
>
> The CHAIRMAN. ***The issue there is whether there is an agreement to arbitrate or not.***
>
> Mr. COHEN. ***Exactly.***[8]

If there is a material question as to the making of the agreement, *e.g.*, a question as to the authority of a signatory, then the contesting party would be entitled to a jury trial on the matter. If a jury can make factual determinations about a party's intentions or authority, presumably having the arbitration agreement in view,

---

Before the Subcommittees of the Committees on the Judiciary, 68th Cong. 10 (1924).

[8] *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce among the States or Territories or with Foreign Nations: Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 17 (1924) (emphasis added).

then a State Supreme Court can make a determination of a principal's intentions based upon the interpretation of legal language in a Common Law instrument. Kindred's position essentially renders the jury provision of 9 U.S.C. § 4 a nullity. For this Court to hold the Kentucky Supreme Court's decision preempted, and accept Kindred's proposed omnivorous interpretation of the FAA, would be to see the FAA as devouring itself. This Court has held that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause'" is rendered "'superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (*quoting Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Ironically, to respect the continued efficacy of the black letter of the FAA itself, Kindred's argument must fail.

CONCLUSION

For the foregoing reasons, the judgment of the Kentucky Supreme Court should be affirmed or the writ of certiorari dismissed.

Respectfully submitted.

ROBERT E. SALYER
Counsel of Record
WILKES & MCHUGH, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com
and

JAMES T. GILBERT
COY, GILBERT, SHEPHERD & WILSON
212 North Second Street
Richmond, KY 40475
(859) 623-3877
Counsel for Respondents

JANUARY 2017

AND
BRIEFS

FILED
FEB - 6 2017

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONERS

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

I. The FAA Applies To The State-Law Interpretive Rule Announced Below. 3

A. The Challenged State-Law Rule Governs The Enforceability Of Arbitration Agreements. 4

B. The FAA Preempts State-Law Rules That Make Arbitration Agreements More Difficult To Form Than Other Contracts. 9

C. Application Of The FAA Here Does Not Threaten To Federalize State Agency Or Contract Law. 12

II. The Decision Below Conflicts With The FAA And Defies This Court's Precedents. 13

A. The Explicit-Reference Rule Cannot Be Justified Under General Principles Of Kentucky Law 13

1. The explicit-reference rule does not apply to all kinds of contracts, nor does it comport with generally-applicable principles for interpreting powers of attorney. 14

2. The explicit-reference rule cannot be salvaged by calling it a rule that applies generally to transactions with "significant legal consequences." 18

3. The FAA precludes policy-based exceptions for nursing home-related claims. 20

TABLE OF CONTENTS—continued

Page

B. The Explicit-Reference Rule Is Inconsistent With This Court's Precedents.....21

CONCLUSION.....23

TABLE OF AUTHORITIES

Page(s)

CASES

14 Penn Plaza LLC v. *Pyett*,
556 U.S. 247 (2009) 20, 21

Allied-Bruce Terminix Co. v. *Dobson*,
513 U.S. 265 (1995) 4, 13, 21

Arthur Andersen LLP v. *Carlisle*,
556 U.S. 624 (2009) 5, 6

AT&T Mobility LLC v. *Concepcion*,
563 U.S. 333 (2011) ..... *passim*

Atl. Marine Constr. Co. v. *Dist. Ct. for the Western Dist. of Texas*,
134 S. Ct. 568 (2013) 13

Baker v. *LeBoeuf, Lamb, Leiby & MacRae*,
1993 WL 662352 (S.D. Ohio 1993) 15

Breazeale v. *Victim Services, Inc.*,
2016 WL 4059258 (N.D. Cal. 2016) 4

Buckeye Check Cashing v. *Cardegna*,
546 U.S. 440 (2006) 9

Button v. *Drake*,
195 S.W.2d 66 (Ky. 1946) 17

DIRECTV, Inc. v. *Imburgia*,
136 S. Ct. 463 (2016) ..... *passim*

Doctor's Associates, Inc. v. *Casarotto*,
517 U.S. 681 (1996) ..... *passim*

First Options of Chicago, Inc. v. *Kaplan*,
514 U.S. 938 (1995) ..... *passim*

Gabby v. *Roberts*,
35 S.W.2d 284 (Ky. 1931) 7

TABLE OF AUTHORITIES—continued

Page(s)

Kimble v. *Marvel Entm't, LLC*,
135 S. Ct. 2401 (2015) 13

LP Pikeville, LLC v. *Wright*,
2014 WL 1345293 (Ky. Ct. App. 2014) 16

Marmet Health Care Center, Inc. v. *Brown*,
565 U.S. 530 (2012) (per curiam) 12, 13, 16, 20

Mitsubishi Motors Corp. v. *Soler Chrysler Plymouth, Inc.*,
473 U.S. 614 (1985) 21

Nitro-Lift Techs., LLC v. *Howard*,
133 S. Ct. 500 (2012) (per curiam) 3, 12, 16

Perry v. *Thomas*,
482 U.S. 483 (1987) ..... *passim*

Ping v. *Beverly Enters., Inc.*,
376 S.W.3d 581 (Ky. 2012) 4, 6, 14, 15

Rent-A-Center, West, Inc. v. *Jackson*,
561 U.S. 63 (2010) 22

Rice v. Floyd,
768 S.W.2d 57 (Ky. 1989) 14

Saturn Distribution Corp. v. *Williams*,
905 F.2d 719 (4th Cir. 1990) 10, 11

Sec. Indus. Ass'n v. *Connolly*,
883 F.2d 1114 (1st Cir. 1989) 10

Select Portfolio Servicing, Inc. v. *Blevins*,
494 S.W.3d 510 (Ky. Ct. App. 2016) 6

TABLE OF AUTHORITIES—continued

Page(s)

Southland Corp. v. *Keating*,
465 U.S. 1 (1984) 13

Sprint Commc'ns Co. v. *APCC Servs., Inc.*,
554 U.S. 269 (2008) 17

Villanueva v. *Brown*,
103 F.3d 1128 (3d Cir. 1997) 7

STATUTES

9 U.S.C. § 2 ..... *passim*

9 U.S.C. § 4 8

Ky. Rev. Stat. § 394.040 19

Ky. Rev. Stat. § 402.050 19

Uniform Power of Attorney Act § 203(4) 15

MISCELLANEOUS

RESTATEMENT (THIRD) OF AGENCY
§ 2.02 (2006) 14, 18

REPLY BRIEF FOR PETITIONERS[1]

Respondents and their *amici* focus relatively little attention on the question presented: whether arbitration agreements are singled out for disfavored treatment by the Kentucky Supreme Court's rule—holding that a power of attorney expressly authorizing the attorney-in-fact to accept "contracts" does not convey the authority to accept an arbitration agreement without an additional, explicit reference to arbitration.

They instead broadly assert that the Federal Arbitration Act (FAA) and this Court's precedents have no role to play here. *E.g.*, Resp. Br. 15-25, 40-46; Supp. Br. 1-4. That contention is plainly wrong.[2]

First, respondents err in characterizing the issue presented here as one of contract formation. There is no dispute that respondents' respective principals executed power-of-attorney documents that appointed respondents as attorneys-in-fact; nor is there a dispute that respondents entered into arbitration agreements on behalf of their principals. The only question is whether those agreements should be enforced, the answer to which turns entirely on the *interpretation* of the powers of attorney, not their formation.

---

[1] The Rule 29.6 Statement in the opening brief remains accurate.

[2] Respondents' Supplemental Brief is improper. Respondents cite Rule 25.5, but the only "intervening" development after they filed their initial brief was the filing of *amicus curiae* briefs in support of their position. We nonetheless explain why the issues raised in the Supplemental Brief lack merit.

A similar rhetorical maneuver was attempted by the respondent—and rejected by this Court—in *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2016). There is no legally significant difference between the Kentucky court's interpretation of the authority to make "contracts" in a power-of-attorney document and the California Court of Appeal's interpretation of the phrase "law of your state" in a consumer contract.

The interpretation of powers of attorney—like the interpretation of contract terms—must give effect to the intent of the parties based on the language of the document. And here—as in *Imburgia*—the state court adopted a "unique" interpretation "restricted to [the] field" of arbitration that failed to "place[] arbitration contracts on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 468-69 (quotation marks omitted).

Second, even if the Kentucky court's rule were a rule of contract formation, it would still be preempted by the FAA. States cannot impose added burdens on the formation of arbitration agreements any more than they can burden such agreements' enforceability. If the rule were otherwise, it would be trivially easy for States to disfavor arbitration and erect barriers to the creation of arbitration agreements, acting upon the very judicial hostility to arbitration that the FAA was enacted to prevent.

Third, respondents turn the Supremacy Clause on its head in protesting that application of the FAA here would violate separation-of-powers principles. As this Court underscored just last term, "[t]he Federal Arbitration Act is a law of the United States," and, "[c]onsequently, the judges of every State must follow it." *Imburgia*, 136 S. Ct. at 468.

Once respondents' claims about the FAA's inapplicability are eliminated, it is clear that the Kentucky court's ruling cannot stand. Here, as in *Imburgia*, the state court failed to honor the same "equal footing" principle that this Court has invoked time and time again to prohibit States from "singling out arbitration provisions for suspect status" in violation of the FAA. *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see also, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). The Kentucky court's special rule for determining whether an attorney-in-fact is authorized to sign an arbitration agreement thus "disregards this Court's precedents on the FAA" (*Nitro-Lift Techs., LLC* v. *Howard*, 133 S. Ct. 500, 503 (2012) (per curiam)), and must be reversed.

I. The FAA Applies To The State-Law Interpretive Rule Announced Below.

Respondents attempt to evade the application of the FAA and this Court's precedents by asserting that the decision below is about "the *a priori* existence of an arbitration agreement." Resp. Br. 15-17. That argument is wrong on two counts: the issue here involves the enforceability of an arbitration agreement; and even if it did not, the FAA would still apply.[3]

---

[3] Indeed, respondents' own *amici* agree that the FAA can preempt "state-law principles that govern how contracts are formed, whom they bind, how they are interpreted, and what defenses may exist to their enforcement." Pub. Citizen Br. 3-4; see also AAJ Br. 4. And while those *amici* argue that the decision below represents an application of ordinary contract prin-

A. The Challenged State-Law Rule Governs The Enforceability Of Arbitration Agreements.

This is a case about the interpretation of power-of-attorney documents to determine the enforceability of arbitration agreements.

1. It is undisputed that the principals (the nursing home residents) executed valid powers of attorney designating the respective respondents as their attorneys-in-fact. J.A. 7-13. Each respondent signed the admission paperwork on behalf of his or her principal. Pet. App. 6a-7a. There is no dispute that each respondent also separately signed an optional arbitration agreement. J.A. 20, 27. It is further undisputed that each arbitration agreement is in writing and evidences a transaction involving commerce, and is therefore subject to the FAA. 9 U.S.C. § 2; *Ping* v. *Beverly Enters., Inc.*, 376 S.W.3d 581, 589-90 (Ky. 2012) (holding that the FAA applies "to arbitration provisions in nursing home admission contracts"; collecting authorities); accord *Allied-Bruce Terminix Co.* v. *Dobson*, 513 U.S. 265, 270, 274-75 (1995) (holding that the FAA reaches to the full extent of Congress' power over interstate commerce).[4]

---

ciples, that contention is demonstrably incorrect. See Part II, *infra*.

[4] Respondents cite (Supp. Br. 2) *Breazeale* v. *Victim Services, Inc.*, 2016 WL 4059258 (N.D. Cal. 2016), which held that an arbitration agreement in a non-prosecution agreement between a State District Attorney and a criminal suspect regarding a potential state-law criminal violation did not implicate a transaction involving commerce because the agreement arose from plea bargaining. *Id.* at *3-5. Whatever the merits of *Breazeale*, the arbitration agreements here evidence transactions in interstate

The only question in this case, then, is whether the arbitration agreements should be enforced. And the answer to that question depends not on disputes over the *formation* of either the arbitration agreements or the powers of attorney, but rather on the *interpretation* of the power-of-attorney documents to determine the scope of the authority conferred.

Respondents' argument that the power-of-attorney documents do not themselves contain arbitration provisions (Supp. Br. 2) does not allow the State to avoid applying generally-applicable principles of law to determine the authority that those documents gave respondents. What the court below did—and what Section 2 of the FAA squarely forecloses—was to condition the enforceability of *arbitration agreements* signed by attorneys-in-fact, and governed by the FAA, on complying with a novel explicit-reference requirement that is not applicable in determining an attorney-in-fact's authority to enter into other kinds of contracts. See 9 U.S.C. § 2 (providing that written agreements to arbitrate disputes are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). Thus, as Justice Noble noted in dissent, the majority's interpretive rule does not actually "affect[] the *formation* of a contract to arbitrate." Pet. App. 100a.

2. One set of *amici* focuses on the principle that a "third party generally may not commit a non-party to a contractual relationship" unless authorized to do so under "'traditional principles of state law.'" AAJ Br. 6 (quoting *Arthur Andersen LLP* v. *Carlisle*, 556 U.S.

---

commerce, and respondents did not argue otherwise below; nor did the Kentucky court hold otherwise.

624, 631 (2009)) (some quotation marks omitted). That argument is puzzling, because the entire question here is whether the lower court applied generally-applicable legal principles, as the FAA requires.

Indeed, this Court in *Arthur Andersen* explained that state law "is applicable to determine which contracts are binding under § 2 and enforceable under § 3" only "'*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts *generally*.'" 556 U.S. at 630-31 (emphasis added) (quoting *Perry*, 482 U.S. at 492 n.9); see also *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (holding that federal courts determine whether an arbitration agreement was formed based on "*ordinary* state-law principles that govern the formation of contracts.") (emphasis added).[5]

3. It is no answer for respondents to assert that "[Kentucky] courts are the ultimate authority" on Kentucky agency or contract law; the same was true of the California courts in *Imburgia*. 136 S. Ct. at 468. The FAA requires this Court to "decide whether the decision of the [Kentucky] court places arbitration contracts on equal footing with all other contracts" (*ibid.* (quotation marks omitted))—and to hold preempted a state-law rule that fails that test. See also Pet. Br. 31-32.

---

[5] As *amici* concede, "agency" is a traditional principle of state law that can bind a nonparty to an arbitration agreement (AAJ Br. 9-10), and in Kentucky (as elsewhere), "[a] power of attorney creates an agency relationship between the principal and the agent." *Select Portfolio Servicing, Inc.* v. *Blevins*, 494 S.W.3d 510, 514 (Ky. Ct. App. 2016) (citing *Ping*, 376 S.W.3d at 591).

Respondents principally attempt to distinguish *Imburgia* by arguing that *Imburgia* involved judicial interpretation of a contract while this case involves judicial interpretation of power-of-attorney documents. Resp. Br. 19, 40; see also *id.* at 12, 25-27 (arguing that the decision below "did not announce a rule of contract law").

But any "state-law principle" that is used to refuse enforcement of an arbitration agreement runs afoul of the FAA if it "takes its meaning precisely from the fact that a contract to arbitrate is at issue" (*Perry*, 482 U.S. at 492 n.9) or is applied "in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341; see also Pet. Br. 13-14.

Moreover, respondents advance a distinction without a difference. A power of attorney is a particular type of formal instrument under which the principal confers certain authority on the agent. That is why powers of attorney "should be construed in accordance with the rules for interpreting written instruments generally." *Villanueva* v. *Brown*, 103 F.3d 1128, 1136 (3d Cir. 1997); see also Resp. Br. 27 (interpreting a power-of-attorney document requires "construing the writing" to give effect to the intent of the principal) (quoting *Gabby* v. *Roberts*, 35 S.W.2d 284, 285 (Ky. 1931)).

Accordingly, respondents' remarkable assertion that *Imburgia* would have turned out differently had the California court been construing "the intentions of the parties" holds no water. Resp. Br. 13, 40. Indeed, this Court made clear that the California court *was* purporting to construe the intentions of the parties. See 136 S. Ct. at 468 ("The Court of Appeal decided that, as a matter of contract law, the parties did mean the phrase 'law of your state' to refer to

[preempted state law]"). The problem was that "[t]he Court of Appeal did not explain why parties might generally intend the words 'law of your state' to encompass '*invalid* law of your state'" (*id.* at 469)—just as the court below did not offer any coherent explanation why a principal conferring a broad authority to make "contracts" generally intends to confer authority to make any kind of contract except a dispute-resolution agreement.

Indeed, respondents' argument that a principal "may discriminate against arbitration as much as he or she wants" (Resp. Br. 39) only reinforces the parallel to *Imburgia*. Just as, "[i]n principle, [parties] might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California including the *Discover Bank* rule and irrespective of that rule's invalidation in *Concepcion*" (136 S. Ct. at 468), so too might a principal choose to confer on his attorney-in-fact the authority to make all contracts on his behalf except dispute-resolution agreements.

But the question is whether the principal *actually did so*, and what the court may not do, "consistent with the [FAA]" (*ibid.*), is adopt a unique rule that a power of attorney broadly authorizing an attorney-in-fact to enter into "contracts" really (and illogically) excludes one type of contract—dispute-resolution agreements—from that authorization.[6]

---

[6] Respondents also state that, because the FAA provides for a jury trial if "the making of the agreement for arbitration" is "in issue" (9 U.S.C. § 4), that provision somehow justifies reserving to state courts the ultimate right to decide disputes over the interpretation of powers of attorney and the authority that they

B. The FAA Preempts State-Law Rules That Make Arbitration Agreements More Difficult To Form Than Other Contracts.

Even if respondents were right that the explicit-reference rule announced below applies solely to contract formation, the FAA would still apply, for several reasons.

First, respondents cite no relevant authority for the proposition that the FAA is categorically inapplicable to contract-formation disputes. They point to *Buckeye Check Cashing* v. *Cardegna*, 546 U.S. 440 (2006) in passing (Resp. Br. 16), but the issue in that case was completely different. *Buckeye* applied the rule of severability in distinguishing between challenges to the validity of a contract as a whole—which are ordinarily reserved to an arbitrator—and challenges "to the arbitration clause itself," which generally are decided by a court. *Buckeye*, 546 U.S. at 444-46 & n.1. *Buckeye* certainly did not exclude formation disputes from the FAA's ambit.

Beyond that, respondents cherry-pick a passage from the 1924 submission to Congress by Julius Henry Cohen, one of the drafters of the FAA. Supp. Br. 3. But Cohen's statement that "whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made" is

---

confer. Resp. Br. 44-46. But the jury trial right under the FAA is limited to addressing factual disputes about contract formation, and there is no factual dispute here; as respondents elsewhere acknowledge, "[i]n Kentucky, determination of the intent encompassed in a power of attorney is a matter of law, and a matter for the courts." *Id.* at 3 n.1. Likewise, the question whether the FAA precludes the legal rule announced below is a pure issue of law appropriate for resolution by this Court.

entirely consistent with this Court's repeated pronouncements that whether an arbitration agreement was formed is based on "ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944 (citing, *inter alia*, *Perry*, 482 U.S. at 492 n.9). Nothing in the FAA or this Court's precedents suggests that *all* state-court rules of contract formation—even those that single out arbitration for suspect status and reflect the judicial hostility that the FAA was enacted to prevent—are insulated from the FAA.[7]

Second, respondents have no convincing response to decisions expressly holding that the FAA's reach extends to state laws that prohibit the formation of arbitration agreements. Pet. Br. 32 (citing *Saturn Distribution Corp.* v. *Williams*, 905 F.2d 719 (4th Cir. 1990); *Sec. Indus. Ass'n* v. *Connolly*, 883 F.2d 1114, 1117 (1st Cir. 1989)). They ignore *Connolly* entirely and try to distinguish *Saturn* solely on the basis that it involved "statutory law" rather than a judicially-created rule. Resp. Br. 21.

That attempted distinction is squarely foreclosed by this Court's precedents. As we pointed out in our opening brief, "the FAA preempts any 'state law, whether of legislative *or judicial* origin,' that disfavors arbitration." Pet. Br. 14 (quoting *Perry*, 482 U.S. at 492 n.9 (emphasis added)); see also *Casarotto*, 517 U.S. at 687 n.3. The same rationale defeats respondents' attempt to distinguish *Casarotto* on the grounds

---

[7] Indeed, the majority below itself stated that "the question of whether an arbitration agreement was ever formed is a matter of state law, so long as the state law in question *does not single out arbitration agreements*." Pet. App. 44a (emphasis added; quotation marks omitted).

that it involved a "legislative" mandate rather than a judicial one. Resp. Br. 22.

Third, respondents fail to acknowledge the absurd results that would flow from their proposed approach. States would have carte blanche to impose laws blatantly disfavoring arbitration so long as those discriminatory standards applied to the formation of new arbitration agreements rather than to existing ones. See Pet. Br. 33-34. Respondents cannot explain how "restrict[ing] the FAA to existing agreements" would avoid "allow[ing] [S]tates to 'wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts.'" *Saturn*, 905 F.2d at 722-23. Indeed, they appear to embrace that impermissible result, arguing that the decision below is immune from the Supremacy Clause "[r]egardless of how the Kentucky Supreme Court came to its conclusion." Supp. Br. 4.

Finally, respondents caricature our position in arguing that "the FAA does not exist to make arbitration agreements easier to form." Resp. Br. 12. That's not the issue here. As this Court has held time and again, the "equal footing" principle embodied by Section 2 of the FAA does preclude States from conversely making arbitration agreements *harder* to form or enforce than other types of contracts. *E.g.*, *Imburgia*, 136 S. Ct. at 468-69; *Concepcion*, 563 U.S. at 339; *Casarotto*, 517 U.S. at 687; *Perry*, 482 U.S. at 492 n.9. Because the decision below does just that, it cannot stand under the FAA.

C. Application Of The FAA Here Does Not Threaten To Federalize State Agency Or Contract Law.

Respondents' final bid to avoid application of the FAA is to assert, much as they did at the petition stage (Opp. 34), that reversal would "federaliz[e] all sorts of State law determinations regarding agency and authority" and amount to a commandeering of state courts. Resp. Br. 40-44.

These hyperbolic contentions run headlong into the Supremacy Clause, which "forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Imburgia*, 136 S. Ct. at 468 (quotation marks omitted). As this Court has recognized, because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs.*, 133 S. Ct. at 501; see also *Marmet Health Care Center, Inc.* v. *Brown*, 565 U.S. 530, 531 (2012) (per curiam) ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.").

Far from "federalizing the State law of agency to a large extent" (Resp. Br. 44), this case, like *Imburgia*, requires nothing more than applying the unexceptional "equal footing" principle that this Court has invoked many times to police States that have treated arbitration agreements differently from other contracts. See *Casarotto*, 517 U.S. at 687 (noting that the FAA "preclude[s] States from singling out arbitration provisions for suspect status"); see al-

so, *e.g.*, *Concepcion*, 563 U.S. at 339; *Perry*, 482 U.S. at 492 n.9.[8]

II. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

A. The Explicit-Reference Rule Cannot Be Justified Under General Principles Of Kentucky Law.

The Kentucky Supreme Court has actually required explicit authorization in a power of attorney for only one type of contract—arbitration agree-

---

[8] An *amicus* law professor urges this Court to overrule *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), and hold the FAA inapplicable in state courts. Szalai Br. 11-23. *Stare decisis* provides reason alone to reject that request. Pet. Br. 18-19 (citing *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-10 (2015)); see also *Allied-Bruce*, 513 U.S. at 283-84 (O'Connor, J., concurring) (refusing to vote to overrule *Southland* on the basis of *stare decisis*; "as the Court points out, more than 10 years have passed since *Southland*, several subsequent cases have built upon its reasoning, and parties have undoubtedly made contracts in reliance on the Court's interpretation of the Act in the interim"). The reasons that the majority in *Allied-Bruce*, along with Justice O'Connor's concurrence, identified for according *Southland stare decisis* effect have only been reinforced further by the passage of two additional decades.

In all events, respondents have never challenged the continued vitality of *Southland*, nor did the parties brief the issue "at any stage of this litigation," which is an independent reason for the Court to "not consider it." *Atl. Marine Constr. Co.* v. *Dist. Ct. for the Western Dist. of Texas*, 134 S. Ct. 568, 580 (2013).

Finally, the same law professor argues that personal-injury claims are categorically excluded from the FAA. But this Court has squarely held that the "statute's text includes no exception for personal-injury or wrongful-death claims." *Marmet*, 132 S. Ct. at 1203. And respondents have never suggested, much less asked, that *Marmet* be overruled.

ments. Respondents and their *amici* labor mightily to shoehorn this arbitration-specific rule into a general principle of Kentucky law. But they cannot: the decision below is a paradigmatic example of a state-law rule that targets arbitration agreements, and is therefore preempted by the FAA.

The lower court's "explicit-reference rule" is not a general application of Kentucky agency law; nor is it a construction of powers of attorney in general. And the rule does not apply even-handedly to the waiver of all constitutional rights, nor to—as respondents have contended—all "acts fraught with major legal implications for the principal." Resp. Br. 28 (quoting RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h. (2006)).

1. The explicit-reference rule does not apply to all kinds of contracts, nor does it comport with generally-applicable principles for interpreting powers of attorney.

Respondents bear the burden of demonstrating that the legal rule applied below is a "ground[] as exist[s] at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). They cannot come close to meeting that standard.

First, respondents argue that *Ping* and other cases stand for the proposition that a power of attorney must be "strictly construed" under Kentucky law (*e.g.*, *Rice v. Floyd*, 768 S.W.2d 57 (Ky. 1989)). Resp. Br 27, 31. In fact, those cases hold only that unbounded general language in a power of attorney—such as the power "to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done" or to do all that the principal "might or could do if personally present" (*Ping*, 376 S.W.3d

at 590-92)—must be construed in tandem with the power of attorney's specific grants of authority.

That proposition is irrelevant here, because the source of respondents' authority to agree to arbitration was the *specific, express* authority to make or enter into contracts. J.A. 7, 10-11; see also Resp. Br. 6 (quoting the language in the Clark power of attorney "*specifically authoriz[ing]* my attorney in fact * * * [t]o draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds, or agreements").[9]

Second, respondents fail to counter our demonstration that explicit authorization is *not* necessary to confer the authority to enter into a forum selection clause under Kentucky law—even though such clauses may also waive a party's constitutional rights. Pet. Br. 26. They claim that a decision by a federal court in Ohio supports their argument (Resp. Br. 29 (citing *Baker* v. *LeBoeuf, Lamb, Leiby & MacRae*, 1993 WL 662352, at *9 (S.D. Ohio 1993))), but they are incorrect. Rather, *Baker* held that defendants who were not parties to or third-party bene-

---

[9] Respondents and their *amici* acknowledge that Justice Abramson (now Hughes), who authored *Ping*, was the principal *dissenter* below (Resp. Br. 11, 36), yet they ignore her cogent explanation of why *Ping* does not apply. See Pet. App. 70a-74a.

Respondents' reference to the fact that Kentucky has not adopted the Uniform Power of Attorney Act (Resp. Br. 14; see also AAJ Br. 19-20) is a non-sequitur. While Section 203 of the Uniform Power of Attorney Act provides that general language "to do all acts that a principal could do" authorizes the principal to "submit [the principal's claims] to alternative dispute resolution" (Uniform Power of Attorney Act § 203(4)), petitioners are not relying on such language as the basis for enforcement of the arbitration agreements here.

ficiaries of a contract containing a forum-selection clause could not enforce that clause against the plaintiffs with whom they had an attorney-client relationship created by a power of attorney that did not itself contain a forum-selection clause.

Third, respondents quibble with our observation (Pet. Br. 22) that Kentucky law has no similar explicit-reference requirement in its guardianship statutes, but we have not argued, as respondents suggest (Resp. Br. 31, 37-39), that attorneys in fact and State-appointed guardians are equivalent. The key fact is, as respondents recognize, the Kentucky Court of Appeals (like the federal court decisions that we cited in our opening brief) has held that guardians' statutory authority to enter into contractual relationships includes the power to enter into predispute arbitration agreements. *Id.* at 37 (citing *LP Pikeville, LLC* v. *Wright*, 2014 WL 1345293 (Ky. Ct. App. 2014)).

Their suggestion that the grant of review and the possibility of reversal by the Kentucky Supreme Court in *Wright* should insulate the decision below from criticism, however, is misplaced. On the contrary, while respondents are correct that "[w]hether or not a State legislature may discriminate against arbitration in its State guardianship statutes is of course a different question" than the one presented here (Resp. Br. 39), the possibility that the court below will compound its erroneous interpretation of the FAA in future cases is all the more reason to correct it now. See *Nitro-Lift*, 133 S. Ct. at 501; *Marmet*, 565 U.S. at 531.

Finally, respondents echo the majority's conclusion that the Wellner power of attorney's authorization to make "contracts * * * in relation to * * * per-

sonal property" does not encompass predispute arbitration agreements. Resp. Br. 6. But they also concede, as did the majority, that "a chose-in-action is property under Kentucky law." *Id.* at 9; see also Pet. App. 36a; *Button* v. *Drake*, 195 S.W.2d 66, 69 (Ky. 1946). Thus, they are left simply repeating the majority's spurious assertion that an agreement to arbitrate a principal's legal claims somehow does not relate to those claims. Resp. Br. 9-10; Pet. App. 37a. Indeed, respondents do not engage at all with our discussion of both the dissent's powerful rebuttal to this point and this Court's decisions similarly recognizing that a cause of action is a species of property. Pet. Br. 23.[10]

---

[10] One of respondents' *amici* tries a different tack, arguing that the language in the Wellner power of attorney does not authorize predispute arbitration agreements on the theory that future legal claims that have not accrued are not yet property. Pub. Citizen Br. 12. They quote *Button* for the proposition that a chose in action creates a right "not reduced to possession," but that proposition does not advance their theory, because (as this Court has observed) immediate reducibility to possession is not the defining characteristic of a property right. See *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 275 (2008) (noting that a "'chose in action'" is "an interest in property not immediately reducible to possession"). Moreover, it would be nonsensical to limit the authority to make contracts in relation to personal property to cover only the principal's existing property interests—that would yield the illogical result, for instance, that the attorney-in-fact could sell the principal's existing possessions at the time the power of attorney was executed but not future possessions that the principal has yet to acquire.

2. The explicit-reference rule cannot be salvaged by calling it a rule that applies generally to transactions with "significant legal consequences."

Respondents offer little in response to our demonstration—and that of the principal dissent below—that the majority's own reasoning impermissibly targets only those constitutional rights that are inherently affected by arbitration agreements. See Pet. Br. 24-26. And they do not directly engage at all with our showing that upholding the decision below would leave States free to discriminate against arbitration in countless ways. *Id.* at 29-30.

They instead resort to the majority's invocation of the rule that actions with "significant legal consequences" for the principal are "not to be inferred lightly." Pet. App. 39a (quoting RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h); Resp. Br. 28.

But the majority itself recognized that there was nothing to "infer[]" in the Clark power of attorney's "broad grant of authority" to make contracts and therefore the rule did not apply (Pet. App. 39a). Thus, this principle of agency law plainly did not supply the basis for the majority's decision. Rather, the majority's explicit-reference requirement turned on its elevation of the jury trial right to sacrosanct status—an elevation that conflicts with the FAA's purposes. Pet. Br. 17-29.

It is also telling that neither respondents nor their *amici* are able to articulate any other transactions to which the explicit-reference rule might apply beyond the parade of improbable horribles trotted out by the majority. They instead rest on the majority's example that an attorney-in-fact entering into an

arbitration agreement on behalf of her principal would be as unexpected and significant as the attorney-in-fact binding the principal to an arranged marriage. Resp. Br. 29-30; AAJ Br. 18-19. To state the comparison is to refute it: as the dissent below pointed out, arbitration agreements "are commonplace," unlike this fanciful example. Pet. App. 97a; see also Pet. Br. 28-29.

The example—along with *amici*'s observation that Kentucky law precludes an attorney-in-fact from authoring a will for a principal (AAJ Br. 19)—also misses the point more broadly. States are generally free as a policy matter (consistent with constitutional constraints) to impose requirements on the validity of marriages or wills that do not apply to other kinds of contracts or written instruments. *E.g.*, Ky. Rev. Stat. § 394.040 (requiring two witnesses to a will not written entirely by the testator); *id.* § 402.050 (solemnization and two-witness requirements for marriages). But the FAA precludes States from erecting similar hurdles to the formation or enforceability of arbitration agreements when those requirements do not apply to *all* contracts. See pp. 3-11, *supra*.

Likewise unavailing is *amici*'s attempted comparison between the waiver of a jury trial inherent in an arbitration agreement and the judicial colloquy required for a criminal defendant to waive his right to a jury trial. AAJ Br. 10-12. *Amici* ignore entirely the numerous cases rejecting arguments that a heightened "knowing and voluntary waiver" standard applies to the enforcement of an arbitration agreement. Pet. Br. 26 n.7. If anything, the attempted comparison only reinforces the point made by the dissent below: as a matter of Kentucky law and his-

tory, the jury trial right takes on much greater importance in criminal felony cases than in civil disputes. *Id.* at 24 n.6; App. 89a-90a n.26.

3. The FAA precludes policy-based exceptions for nursing home-related claims.

Several *amici* further suggest that the explicit-reference rule is warranted by perceived problems concerning resident care in the nursing home industry. AARP Br. 13-20; Pub. Citizen Br. 4-6. But this suggestion suffers from at least three fundamental flaws.

First, this Court's decision in *Marmet*, which also involved nursing home-related claims, squarely rejected West Virginia's attempt to exclude such claims from the FAA's reach on policy grounds as "contrary to the terms and coverage of the FAA." 565 U.S. at 533; see also n.8, *supra*.

Second, state public policy concerns can neither substitute for nor override congressional judgment. See *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009) (holding that the FAA precludes reliance on "judicial policy concern[s] as a source of authority" for refusing to enforce arbitration agreements); see also *Concepcion*, 563 U.S. at 342 (explaining that the FAA was enacted to eliminate the "'great variety' of 'devices and formulas' declaring arbitration against public policy"). *Amici*'s policy arguments are properly directed to Congress, not the courts.

Third, these policy arguments are also wrong. They all stem from the erroneous premise that arbitration is inadequate to protect the rights of nursing home residents and their families. But as *amici* in support of petitioners explain, nursing home residents and their representatives fare comparably in

arbitration and litigation, and arbitration results in lower costs and quicker resolution of their claims. Am. Health Care Ass'n Br. 5-8; Genesis Healthcare Br. 12-17; see also Chamber of Commerce Br. 3-13 (collecting "data confirm[ing] that arbitration is cheaper and faster than litigation and produces fair outcomes" in general).

This Court has likewise repeatedly acknowledged the "advantages" of arbitration. *Allied-Bruce*, 513 U.S. at 280; see also, *e.g.*, *Concepcion*, 563 U.S. at 345; *14 Penn Plaza*, 556 U.S. at 257; *Mitsubishi Motors Corp.* v. *Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Indeed, "we are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27.

Finally, respondents and their *amici* cannot justify the hostility to arbitration reflected by the decision below by pointing out *other* cases in which the Kentucky Supreme Court has enforced arbitration agreements. See Resp. Br. 25-26; AAJ Br. 24. The question presented is whether the explicit-reference rule announced in *this case* comports with the FAA, and it does not.

For all of these reasons, the Kentucky court's explicit-reference rule cannot be saved from preemption as an even-handed application of Kentucky law.

B. The Explicit-Reference Rule Is Inconsistent With This Court's Precedents.

Based on this Court's statements that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration," *First Op-*

tions, 514 U.S. at 945, and that the delegation of issues of arbitrability to an arbitrator must be "clear and unmistakable," *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 69-70 & n.1 (2010), *amici* assert that "courts ought to hesitate to interpret silence as to the waiver of constitutional rights in an agency agreement to permit waiver." AAJ Br. 14; see also Pub. Citizen Br. 15-17. Their argument appears to be that the specificity required under *First Options* and *Rent-A-Center* should also apply to powers of attorney.

But these analogies do not work. *First*, this Court's precedents do not require parties to spell out by name each of the issues that are within the scope of their arbitration agreements. For instance, an arbitration provision covering "all claims or controversies between the parties" means just that—all disputes—without the need to list what those disputes might be. For the same reason, the authority in a power of attorney to make "contracts" covers all contracts, without the need to spell out what contracts those might be. In other words, the powers of attorney were far from "silen[t]" on the matter at hand; it is enough that the powers of attorney expressly authorized the attorneys-in-fact to make or enter into contracts.

Second, the specificity that this Court requires for the delegation of issues of *arbitrability* is based on an underlying *federal* default rule: that a court, and not an arbitrator, will decide threshold questions of arbitrability, such as whether the arbitration agreement is enforceable. But the FAA precludes a *State* from adopting a default rule that requires heightened specificity only with respect to arbitration agreements. *E.g.*, *Casarotto*, 517 U.S. at 687-88.

CONCLUSION

The judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

FEBRUARY 2017

RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
OCT 21 2016
OFFICE OF THE CLERK

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to Supreme Court of Kentucky

SUPPLEMENTAL BRIEF FOR PETITIONERS

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

Table of Authorities ii

Supplemental Brief for Petitioners 1

Conclusion 3

TABLE OF AUTHORITIES

Page(s)

Cases

American Health Care Ass'n v. *Burwell*, No. 16-cv-233 (N.D. Miss. Oct. 17, 2016) 2

DIRECTV, Inc. v. *Imburgia*, 136 S. Ct. 463 (2015) 1

Nitro-Lift Techs., L.L.C. v. *Howard*, 133 S. Ct. 500 (2012) (per curiam) 3

Statutes, Rules and Regulations

81 Fed. Reg. 68,688 (Oct. 4, 2016) 1, 2

SUPPLEMENTAL BRIEF FOR PETITIONERS[1]

Pursuant to Rule 15.8, petitioners respectfully submit this supplemental brief to address an additional development since the filing of petitioners' reply brief in September 2016.

On October 4, 2016, the Centers for Medicare & Medicaid Services, a component of the Department of Health and Human Services, promulgated a rule that, if upheld, would prohibit Medicare-participating skilled nursing facilities and Medicaid-participating nursing facilities from entering into new pre-dispute arbitration agreements with residents at their facilities. See Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; Arbitration Rule, 81 Fed. Reg. 68,688 (Oct. 4, 2016) (the "Arbitration Rule").

The Arbitration Rule does not impact the importance of the question presented in this case nor the propriety of this Court's review—including summary reversal or vacatur for reconsideration in light of *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015)—for at least three reasons.

First, the Arbitration Rule applies only prospectively. In adopting the rule, the agency "emphasize[d] that this final rule * * * does not have any effect on existing arbitration agreements or render them unenforceable." 81 Fed. Reg. at 68,800. The rule therefore does not affect the enforceability of the arbitration agreements at issue here, or of the "countless [other preexisting] arbitration agreements" between care facilities and their residents

[1] The Rule 29.6 Statement in the Petition remains accurate.

that have been placed into doubt by the decision below. Pet. Reply 4 (quoting Br. of Am. Health Care Ass'n et al. 6, 7). Indeed, the large number of lower court decisions in Kentucky alone in the short time since the decision below (Pet. 17-19; Pet. Reply 3) provides stark evidence of the large number of contracts potentially affected and the frequency with which the legal issue will arise.

Second, the Arbitration Rule itself may be invalidated. Earlier this week, the American Health Care Association, the Mississippi Health Care Association, and several individual long-term care facilities filed suit challenging the validity of the Arbitration Rule and seeking to enjoin its enforcement. See Complaint, *American Health Care Ass'n* v. *Burwell*, No. 16-cv-233 (N.D. Miss. Oct. 17, 2016), Dkt. No. 1.[2] The plaintiffs contend that the Arbitration Rule violates the FAA, exceeds the agencies' statutory authority under the Medicare and Medicaid Acts, is arbitrary and capricious, and violates the Regulatory Flexibility Act. The Rule therefore may never take effect.

Third, while this case arises in the context of a long-term care facility, the anti-arbitration construction adopted below applies to powers of attorney generally—which can arise in a number of contexts, such as asset or property management, or any other situation in which the principal requires assistance in managing financial or personal transactions.

More broadly, the disregard of this Court's precedents interpreting the Federal Arbitration Act and

---

[2] A copy of the complaint is also available on the American Health Care Association's website. See https://www.ahcancal.org/News/news_releases/Documents/CMS%20Arbitration%20Rule%20-%20complaint%20%2810-16-16%29.pdf.

the hostility to arbitration evidenced by the decision below cry out for this Court's intervention no matter the context. It is crucial that state courts faithfully adhere to this Court's precedents. Again, because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500, 501 (2012) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

October 2016

AND BRIEFS

No. 16-32

Supreme Court, U.S.
FILED
JAN 19 2017
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION CENTER, et al.,

Petitioners,

v.

JANIS E. CLARK, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONDENTS' SUPPLEMENTAL BRIEF

JAMES T. GILBERT
COY, GILBERT, SHEPHERD & WILSON
212 North Second Street
Richmond, KY 40475
(859) 623-3877
jtgilbert@coygilbert.com

ROBERT E. SALYER
Counsel of Record
WILKES & MCHUGH, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com

STEPHEN TRZCINSKI
WILKES & MCHUGH, P.A.
1601 Cherry Street, Suite 1300
Philadelphia, PA 19102
(800) 255-5070
strzcinski@wilkesmchugh.com

Counsel for Respondents

I. INTRODUCTION

Supreme Court Rule 25.6 allows Respondents here to address intervening materials that were not previously available. Following Respondents' initial filing on January 6, 2017, they received supporting *amici curiae* briefs. Respondents would like the opportunity to clarify their position, so there is no ambiguity. Notably, Petitioners have not yet replied to Respondents' brief.

As the American Association for Justice and the Kentucky Justice Association (collectively "AAJ") point out, Kindred "seeks to expand the reach of the FAA to agency agreements . . . that do not involve or mention arbitration." Br. for AAJ at 2. According to Kindred, any "state contract law that is not specific to arbitration must still be preempted if it has an adverse effect on whether a dispute will be arbitrated." *Id.*

In responding to Kindred's position, the AAJ states that "[t]he FAA has no application to the terms of a power of attorney that does not discriminate against arbitration." *Id.* at 4. Respondents' position, in contrast, is that the FAA does not apply to the terms of a power of attorney – period. The FAA has no application to either the powers of attorney or the contract formation issues, whether or not discrimination occurred.

II. ARGUMENT

A. The FAA does not apply to a power of attorney.

A plain reading of Section 2 reveals that the FAA speaks only of a "contract" or an "agreement" that contains an arbitration "provision." 9 U.S.C. § 2; *Breazeale v. Victim Services, Inc.*, ___ F. Supp. 3d ___, No. 14-CV-05266-VC, 2016 WL 4059258, *3 (N.D. Cal. July 27, 2016), *appeal filed*, No. 16-16498 (9th Cir. Aug. 25, 2016). Because neither power of attorney contains an arbitration provision, neither falls under the ambit of the FAA.

Under 9 U.S.C. § 2, a contract will trigger the FAA only if it (1) contains an arbitration provision, and (2) evidences a transaction involving commerce. *Herrera Cedeno v. Morgan Stanley Smith Barney, LLC*, 154 F. Supp. 3d 1318, 1324 (S.D. Fla. 2016). Defendants bear the burden of proving both prongs of the analysis. *Id.* at 1325. But because the powers of attorney do not contain a written arbitration provision, they do not fulfill these requirements. To be sure, "[t]he parties can't agree that Congress intended to reach a contract that it didn't intend to reach." *Breazeale*, 2016 WL 4059258, at *5. And the parties' "mistaken belief that the FAA applies to their agreement cannot make it so." *Id.* Thus, the FAA does not apply in this case, making the Kentucky Supreme Court's intentions and the effects on arbitration irrelevant.

B. The FAA does not reach contract formation issues.

Even if the FAA did apply to powers of attorney, it still does not extend to contract formation issues. The FAA's statutory framework applies only ***after*** a court has determined that a valid arbitration agreement was formed. The FAA may task judges with rigorously enforcing valid arbitration agreements, but it says nothing about the threshold issue of whether an arbitration agreement exists. David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1263 (2013).

Julius Henry Cohen – the FAA's drafter – made clear that the FAA would not infringe "upon the right of each State to decide for itself what contracts shall or shall not exist under its law." *Arbitration of Interstate Commercial Disputes: J. Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 37 (1924). Further, "whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made."[1] *Id.* So, the FAA can influence a contract's ***enforcement***, only after the State has found that a contract exists.

The Kentucky Supreme Court determined that the powers of attorney did not grant the agents authority to enter into an arbitration agreement on behalf of their principals. Thus, the arbitration agreements

---

[1] Cohen's statements are "one of the most important aspects of the [FAA's] legislative history." Horton, *Federal Arbitration Act Preemption* at 1259 (quotation omitted).

were never formed. In the eyes of the law, the agents' signatures were no different than the signature of a perfect stranger. The analysis ends there. Regardless of how the Kentucky Supreme Court came to its conclusion, the express wording of the FAA does not permit it to influence how state courts determine contract formation issues.

C. This Court's function is to apply the FAA, not rewrite it.

Petitioners will likely argue that "parties cannot circumvent the FAA by designating discriminatory state-law rules as rules of contract formation," including those relating to powers of attorney. Cert. Reply Br. 9. But it is not the role of the Court "to conform an unambiguous statute to what [it] thinks 'Congress probably intended.'" *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 n.6. (2009). That role is reserved for Congress itself. *See, e.g.*, *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458 (2007) ("The 'loophole,' in our judgment, is properly left for Congress to consider, and to close if it finds such action warranted.").

Respectfully submitted,

JAMES T. GILBERT
COY, GILBERT,
SHEPHERD & WILSON
212 North Second Street
Richmond, KY 40475
(859) 623-3877
jtgilbert@coygilbert.com

ROBERT E. SALYER
Counsel of Record
WILKES & MCHUGH, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com

STEPHEN TRZCINSKI
WILKES & MCHUGH, P.A.
1601 Cherry Street, Suite 1300
Philadelphia, PA 19102
(800) 255-5070
strzcinski@wilkesmchugh.com

Counsel for Respondents

January 2017

RECORD AND BRIEFS

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,
Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,
Respondents.

On Writ of Certiorari to the Kentucky Supreme Court

BRIEF FOR AARP, AARP FOUNDATION, JUSTICE IN AGING, THE NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE, AND NURSING HOME OMBUDSMAN AGENCY OF THE BLUEGRASS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

William Alvarado Rivera*
**Counsel of Record*
AARP FOUNDATION LITIGATION
601 E Street, N.W.
Washington, D.C. 20049
Tel. (202) 434-3392
warivera@aarp.org
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE SCOPE OF AUTHORITY DELEGATED TO AN AGENT UNDER A POWER OF ATTORNEY MUST BE VIEWED WITH THE PRINCIPAL'S OBJECTIVES IN MIND 4

II. THE KENTUCKY SUPREME COURT ARTICULATED A RULE THAT APPROPRIATELY REQUIRES A RIGOROUS STANDARD FOR AN AGENT'S AUTHORITY TO WAIVE FUNDAMENTAL RIGHTS 9

III. THE RIGHT TO ACCESS THE COURTS IS CRITICAL TO THE MANY VICTIMS OF ELDER ABUSE AND NEGLECT IN NURSING FACILITIES 15

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Am. Health Care Ass'n v. Burwell, No. 16-cv-00233, 2016 U.S. Dist. LEXIS 154110 (N.D. Miss. Nov. 7, 2016) 13, 14

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) 13

Dishman v. Dishman, 2015 Ky. App. Unpub. LEXIS 874 (May 1, 2015) 12

Friedman v. Hebrew Home for the Aged at Riverdale, 13 N.Y.S.3d 896 (N.Y. App. Div. 2015) 1

Kindred Health Ctrs. Ltd. v. Clark, No. 16-32 (Dec. 7, 2016) 5, 12

Kindred Healthcare, Inc. v. Goodman, No. 2014-CA-000589, 2015 Ky. App. Unpub. LEXIS 348 (May 15, 2015) 10, 11

Kindred Nursing Ctrs. v. Clark, 2013-SC-000426, slip op. (Ky. Sept. 24, 2015) 10

Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012) 12

Ping v. Beverly Enters., 376 S.W.3d 581 (Ky. 2012) 6, 10

Preferred Care, Inc. v. Howell, No. 16-13-ART, 2016 U.S. Dist. LEXIS 110495 (E.D. Ky. Aug. 19, 2016) 5

Strausberg v. Laurel Healthcare Providers, 304 P.3d 409 (N.M. 2013) 1

Taylor v. Extendicare Health Facilities, 147 A.3d 490 (Pa. 2016) 1

U.S. Fid. & Guar. Co. v. McGinnis Admin., 147 Ky. 781 (Ky. 1912) 10

STATUTES, RULES AND REGULATIONS

Ky. Rev. Stat. Ann. (LexisNexis 2016)
§ 311.621(8) 6
§ 311.629(1) 6

TREATISES

Restatement (Third) of Agency § 2.02(1) (Am. Law Inst. 2006) 6

LEGISLATIVE HISTORY

Elder Justice and Protection: Stopping the Abuse: Hearing Before the Subcomm. on Aging of the Comm. on Health, Educ., Labor, and Pensions, 108th Cong. (Aug. 20, 2003) 16

Kelly Rice-Schild, *The Fairness in Nursing Home Arbitration Act: Hearing on S. 2838 Before the S. Subcomm. on Antitrust, Competition Pol'y, and Consumer Rights of the S. Comm. on the Judiciary and the Spec. Comm. on Aging*, 110th Cong., 2 (June 18, 2008), http://www.ahcancal.org/advocacy/testimonies/Testimony/AHCA_NCAL_StatementofKRSonArbitration.pdf 18

MISCELLANEOUS

AARP Research Grp., *Where There Is a Will: Legal Documents Among the 50+ Population* (Apr. 2000), http://assets.aarp.org/rgcenter/econ/will.pdf 5

Aon Risk Sols., *Long Term Care General Liability and Professional Liability Actuarial Analysis*, 10 (2015), https://www.ahcancal.org/research_data/liability/Documents/2015%20General%20Liability%20and%20Professional%20Liability%20Actuarial%20Analysis%20Report.pdf 18, 19

Ctrs. for Medicare and Medicaid Servs., U.S. Dep't of Health and Human Servs., *Final Rule: Medicare and Medicaid Programs, Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68,688 (Oct. 4, 2016) 14, 20

Ctrs. for Medicare and Medicaid Servs., U.S. Dep't of Health and Human Servs., *Nursing Home Data Compendium 2015 Edition* (2015), https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/nursinghomedatacompendium_508-2015.pdf 15, 16

John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard*, 44 U. Balt. L. Rev. 407 (Summer 2015) 7, 8, 11

David J. Doukas, M.D. et al., *Living Wills and Other Advance Directives for You and Your Family* (2d ed. 2007) 7

Brenna Kelly, *Systematic Review: Individuals' Goals for Surrogate Decision-Making*, 60 J. Am. Geriatr. Soc. 884 (May 2012) 7

Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 Rutgers L. Rev. 1 (Fall 2006) 8

Jill L. Lens, *Tort Law's Deterrent Effect and Procedural Due Process*, 50 Tulsa L. Rev. 115 (2014) 19

Nat'l Research Council, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* (Richard J. Bonnie & Robert B. Wallace eds., 2003) 15, 16

Laura M. Owings & Mark N. Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, 43 Tenn. B.J. 20 (2007) 13

Andrew F. Popper, *In Defense of Deterrence*, 75 Alb. L. Rev. 181 (2011) 19

Jennifer L. Rhein, Note: *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 Elder L.J. 165 (2009) 11

Christopher B. Rosnick & Sandra L. Reynolds, *Thinking Ahead: Factors Associated with Executing Advance Directives*, 15 J. of Aging and Health 409 (2003) 8

David Shieh, *Unintended Side Effects: Arbitration and the Deterrence of Medical Error*, 89 N.Y.U. L. Rev. 1806 (2014) 19

U.S. Admin. on Aging, *2013 National Ombudsman Reporting System Data Tables*, Tbl. B-2, Tab A (2013), https://aoa.acl.gov/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2013/Index.aspx 16

U.S. Gov't Accountability Office, GAO-07-241, *Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents* 26 (2007), http://www.gao.gov/new.items/d07241.pdf 17, 18

U.S. Gov't Accountability Office, GAO-07-794T, *Nursing Home Reform: Continued Attention Is Needed to Improve Quality of Care in Small but Significant Share of Homes* 9 (2007), http://www.gao.gov/new.items/d07794t.pdf 17

U.S. Gov't Accountability Office, GAO-11-571, *Nursing Homes: Private Investment Homes Sometimes Differed from Others in Deficiencies, Staffing, and Financial Performance*, at Highlights (2011), http://www.gao.gov/assets/330/321067.pdf 18

Denese A. Vlosky et al., *"Say-so" As a Predictor of Nursing Home Readiness*, 93 J. Fam. & Consumer Sci. 59 (2001) 13

Linda S. Whitton, *Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent*, 117 Penn. St. L. Rev. 1037 (2013) 12

INTERESTS OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials. Among other things, AARP and AARP Foundation advocate against the enforcement of pre-dispute arbitration agreements against nursing facility residents, including through participation as amicus curiae in state courts. *E.g.*, *Taylor v. Extendicare Health Facilities*, 147 A.3d 490 (Pa. 2016); *Friedman v. Hebrew Home for the Aged at Riverdale*, 13 N.Y.S.3d 896 (N.Y. App. Div. 2015); *Strausberg v. Laurel Healthcare Providers*, 304 P.3d 409 (N.M. 2013).

Justice in Aging is a national, nonprofit law organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. In both policy advocacy and technical assistance, Justice in Aging supports the decision-making rights of older adults,

---

[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to fund the preparation or submission of this brief. No persons other than amici, their members or their counsel made such a monetary contribution. Counsel of record received timely notice of amici's intent to file this brief under Rule 37, and all parties consented to the filing of this brief.

emphasizing the importance of honoring an individual's intent and preferences. Justice in Aging's attorneys are nationally recognized experts on the rights of nursing facility residents, authoring the legal treatise Long-Term Care Advocacy (Matthew Bender and Co.), and have long counseled consumers and their advocates about common but improper nursing facility practices. The organization's policy advocacy and work with consumers and advocates each would be advanced by a ruling affirming the decision of the Kentucky Supreme Court.

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) is a national nonprofit membership organization whose members including residents of long-term care facilities, residents' families, long-term care ombudsmen, consumer advocates, and other groups and individuals who are dedicated to improving quality in long-term care and protecting the rights of the 1.5 million residents of nursing and other long-term care facilities in the United States. Since 1975, Consumer Voice has represented residents' interests before federal and state legislative and administrative entities and in federal and state courts. Specific policy goals of the Consumer Voice are to improve the quality of life and protect the rights of residents of long-term care facilities in the United States.

The Nursing Home Ombudsman Agency of the Bluegrass (NHOA) is a Kentucky-based nonprofit agency that provides advocacy and ombudsman services to residents of long-term care. NHOA

operates the Kentucky Long-Term Care Ombudsman Program and for over 35 years has been advocating on behalf of residents who experience poor care. The Kentucky Long-Term Care Ombudsman program serves 34,000 Kentuckians living in Nursing, Personal Care, and Family Care homes each year. Our ombudsmen worked to resolve over 7,400 long-term care consumer complaints during the past year and 5.9% were related to abuse and neglect. Informing residents of their rights, preventing abuse and neglect and improving care are goals of NHOA.

Amici submit this brief because the Kentucky Supreme Court's decision below correctly held that the question of whether a health care agent acted within his or her authority—and, therefore, whether an agreement to arbitrate was properly formed—must be carefully scrutinized to ensure that rights critical to the protection of older adults in long-term care facilities are not unintentionally waived.

SUMMARY OF ARGUMENT

The scope of an agent's authority depends on the principal's intent in granting that authority. Generally speaking, older adults seeking to delegate the authority to manage their affairs want someone to manage the practicalities of their day-to-day lives, not to waive substantive rights of which they are either unaware or do not foresee a need to exercise. When an operative power of attorney document broadly references an agent's ability to "contract" on the principal's behalf, such references must be

carefully examined in context to determine the principal's intent. As discussed in this brief, the question of the scope of an agent's authority and the court's power to infer authority involve fact-intensive analyses best handled in accordance with traditional state law principles of agency.

The stakes are high for agents making decisions on behalf of nursing facility residents. Neglect and abuse of nursing facility residents is all-too common, and nursing facilities often fail to comply with minimum standards for resident care. Even when noncompliance is detected, penalties often do not deter future abuse or neglect. In this context, a principal's delegation of authority to contract should not be seen as authorizing waiver of a resident's right to seek justice in court, and the Kentucky Supreme Court had ample reason to insist that a principal's decision to waive these rights be clearly spelled out in the operative document.

ARGUMENT

I. THE SCOPE OF AUTHORITY DELEGATED TO AN AGENT UNDER A POWER OF ATTORNEY MUST BE VIEWED WITH THE PRINCIPAL'S OBJECTIVES IN MIND.

This case turns on the scope of an agent's authority as described in a formal power of attorney document, including reasonable inferences that can be drawn from it. The use of powers of attorney is an extremely common mechanism for older adults to

empower surrogate decision-makers without resorting to formal guardianship. *See* AARP Research Grp., *Where There Is a Will: Legal Documents Among the 50+ Population*, 5 (Apr. 2000), http://assets.aarp.org/rgcenter/econ/will.pdf (finding that approximately 45% of adults age 50+ and 70% of adults age 70+ executed a durable power of attorney).

Despite Petitioners' comparisons to the contrary, the relationship between two parties through a power of attorney document is fundamentally different than the relationship between two parties through a guardianship. *Cf.* Br. for Pet'rs at 22, *Kindred Health Ctrs. Ltd. v. Clark*, No. 16-32 (Dec. 7, 2016) (stating "[i]t is also significant that Kentucky law erects no similar barriers to allowing state-appointed guardians...to enter into arbitration agreements on behalf of their wards"). As the U.S. District Court for the Eastern District of Kentucky correctly noted, "[a] guardian, unlike an attorney-in-fact, receives his power from the state—not from the ward himself." *Preferred Care, Inc. v. Howell*, No. 16-13-ART, 2016 U.S. Dist. LEXIS 110495, at *10 (E.D. Ky. Aug. 19, 2016). Thus, the use of powers of attorney is far more preferable to older adults than guardianship, as a principal can exert considerable control in selecting an agent and specifying the authority to be delegated to the agent.

Under Kentucky law, when a principal voluntarily gives up the power to manage his or her affairs to an agent via a power of attorney document, and "a court must decide whether an [agent] has the power to do something," the court must "look[] to the document to see what the principal has allowed." *Id.*

An individual empowered to make "health care decisions"[2] under Kentucky law is generally empowered to make "health care decisions for the [principal] which [the principal] could make individually if he or she had decisional capacity," so long as such decisions are made "in accordance with the desires of the [principal]" as expressed in the operative document. Ky. Rev. Stat. Ann. § 311.629(1) (LexisNexis 2016). The specific words written in the operative power of attorney document, along with the context in which they are written, constitute a "written manifestation" of the principal's intent to delegate to another the authority to manage her own affairs to another. *Ping v. Beverly Enters.*, 376 S.W.3d 581, 591 (Ky. 2012).

An understanding of the principal's intent requires an understanding of the circumstances and motivations under which the principal signed the operative power of attorney document. According to the Restatements of Agency, an agent "has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the *principal's manifestations and objectives*." Restatement (Third) of Agency § 2.02(1) (Am. Law Inst. 2006) (emphasis added).

---

[2] Kentucky law defines a "health care decision" as "consenting to, or withdrawing consent for, any medical procedure, treatment, or intervention." Ky. Rev. Stat. Ann. § 311.621(8) (LexisNexis 2016).

Durable powers of attorney are "anticipatory in nature"—that is, they are prepared with the anticipation of a future decline in competency. John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard*, 44 U. Balt. L. Rev. 407, 412 (Summer 2015). Health care powers of attorney provide an adult with the opportunity to memorialize specific treatment decisions and instructions in the event of his or her incapacity. David J. Doukas, M.D. et al., *Living Wills and Other Advance Directives for You and Your Family* (2d ed. 2007). Researchers identified three primary goals in executing health care powers of attorney. Brenna Kelly, *Systematic Review: Individuals' Goals for Surrogate Decision-Making*, 60 J. Am. Geriatr. Soc. 884 (May 2012). First, principals "want their close family members to make treatment decisions" because they "assume[] that family members would know their treatment preferences." *Id.* at 892-893. Second, principals want to be treated "consistently with their own preferences and values." *Id.* at 893. Finally, principals want to "minimize the burden on their families." *Id.*

For older adults, the execution of a power of attorney is generally premised on the delegation of certain necessary tasks. The principal's perception of what the power of attorney document is intended to do may influence her willingness to sign such a document in the first place. According to one study, "individuals were significantly more likely to complete advance directives when they reported a high sense of control over their lives," suggesting that "individuals who believe that executing a [power of attorney] will cede

significant control to an [agent] may be less likely to do so." Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 Rutgers L. Rev. 1, 45 (Fall 2006) (citing Christopher B. Rosnick & Sandra L. Reynolds, *Thinking Ahead: Factors Associated with Executing Advance Directives*, 15 J. of Aging and Health 409, 424 (2003)).

Given older adults' use of power of attorney documents to authorize only the most practical decision-making authority, the Kentucky Supreme Court was justified in ensuring that older adults truly intend to delegate authority to waive fundamental rights. This is particularly clear in the context presented by this case—a claim by a nursing facility that the power of attorney document authorized the agent to sign a provision waiving the principal's right to seek a remedy in court for a future injury caused by the nursing facility's negligence.

Consider the issue from the perspective of an older adult who wishes to appoint her spouse or child as her agent. The principal is competent to choose an agent, but is concerned about losing cognitive faculties in the future. At this point in time, the principal is concerned with naming someone to oversee her day-to-day affairs, such as making her mortgage or rent payments, or managing her bank account. *See* Craft, *supra*, at 417 (recommending that "[t]o be used effectively as a tool for planning for incapacity, a [power of attorney] must give the agent broad decision-making authority over the principal's finances and property" including the power to "sell or mortgage the

principal's home, withdraw and deposit money in bank and retirement accounts, make gifts, [and] change a principal's estate plan"). The prospect that some future health care provider might abuse or neglect her at some indeterminate point in time is unlikely to be on the principal's mind at the time the document is signed.

The ruling of the Kentucky Supreme Court is entirely consistent with the practical realities of older adults executing powers of attorney. When a power of attorney document refers to "contracts," "contracting," "property rights," or similar concepts, these terms should be understood in the context of an older adult attempting to appoint someone to handle his or her necessary day-to-day affairs. In this context, it is unlikely that a principal would purposefully grant his or her agent the authority to waive certain critical rights, and such authority should not be inferred lightly.

II. THE KENTUCKY SUPREME COURT ARTICULATED A RULE THAT APPROPRIATELY REQUIRES A RIGOROUS STANDARD FOR AN AGENT'S AUTHORITY TO WAIVE FUNDAMENTAL RIGHTS.

Agents of persons who need a nursing facility simply seek to obtain medical care for their loved ones, not to waive fundamental rights. As noted by the Kentucky Supreme Court, arbitration agreements create legal consequences that are "significant and separate" from other powers specified in a power of

attorney document. *Kindred Nursing Ctrs. v. Clark*, 2013-SC-000426, slip op. at 12 (Ky. Sept. 24, 2015).

Whether a power of attorney document authorizes an agent to waive or contract away a fundamental right is a fact-intensive issue that state courts are well-equipped to resolve. The Kentucky Supreme Court correctly noted that, because the authority delegated to an agent will vary in its express terms, each power of attorney document "requires a separate analysis" of its meaning and context. *Id.* at 9. The scope of an agent's authority is "strictly construed" by Kentucky courts, including only (1) "powers which are plainly given" in the operative power of attorney document, and (2) powers that are "necessary, essential, and proper" to carry out express powers granted to the agent. *U.S. Fid. & Guar. Co. v. McGinnis Admin.*, 147 Ky. 781, 786-87 (Ky. 1912). Kentucky courts have long refused to extend the scope any further than that which is "necessary, essential, and proper" to achieve the duties described in the document. *Id.*

In Kentucky, the terms of an agency relationship are not construed in isolation, but rather in context "with reference to the types of transactions expressly authorized in the document." *Kindred Healthcare, Inc. v. Goodman*, No. 2014-CA-000589, 2015 Ky. App. Unpub. LEXIS 348, at *8 (May 15, 2015) (citing *Ping*, 376 S.W.3d at 591-92). For example, Kentucky courts have refused to infer that an agent with the power to "execute and deliver any and all papers" on behalf of the principal has the authority to sign an arbitration agreement where the

remainder of the document strictly discusses management of the principal's "business and financial affairs." *Goodman* at *9.

Given the virtually unlimited authority that can be delegated to an agent in a power of attorney document, it is reasonable—if not advisable—for a state to ensure that certain rights, including, but not limited to, the right to access the court system, are carefully safeguarded from unintended delegation. Durable power of attorney documents can grant agents an enormous amount of power, including the power to sell the principal's home and other tangible assets, to make investments on the principal's behalf, to cancel insurance policies or name new beneficiaries, and even to empty bank accounts. Jennifer L. Rhein, Note: *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 Elder L.J. 165, 168 (2009). Moreover, agents under powers of attorney can operate with "vast, largely unsupervised discretion." Craft, *supra*, at 411. Left unchecked, overbroad interpretations of power of attorney documents can lead to disastrous personal and financial consequences for principals.

This is not to suggest that agents generally intend to overstep their authority or cause harm to their principals; without a doubt, many agents act out of genuine and selfless concern for their loved ones who are unable to make decisions for themselves. However, even the most well-intentioned agent can be confused by broad language in a power of attorney document that leaves little

guidance to the agent as to how the principal would act in specific situations. Linda S. Whitton, *Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent*, 117 Penn. St. L. Rev. 1037, 1044 (2013). To prevent the intentional or accidental over-extension of an agent's authority, a state, as a matter of public policy, can and should set a "back-stop" and demand that the delegation of certain fundamental rights be specifically identified in the power of attorney document. Br. of Resp. in Opp. to Pet. for Cert., *Kindred Health Centers Ltd. v. Clark*, No. 16-32, 24 (Sept. 6, 2016).

That state courts may choose to set limits on their ability to imply an agent's authority is by no means exclusive to arbitration clauses or to nursing facilities. For example, the Kentucky Court of Appeals has held that a power of attorney document granting an agent the broad authority to "convey any real or personal property" to a trust does not imply the authority for the agent to create the trust itself or to name herself as trustee. *Dishman v. Dishman*, 2015 Ky. App. Unpub. LEXIS 874, at *49-50 (May 1, 2015) (stating that "in order for an [agent] to create a trust pursuant to a [power of attorney], this authority must be expressly provided for in the instrument if it contains a provision related to trusts").

This is not a case that concerns whether a state may strike down or disfavor arbitration agreements solely because they are arbitration agreements. The Court's precedents on this point are clear that a state may not do so. *See Marmet Health*

Care Ctr., Inc. v. Brown, 565 U.S. 530, 532 (2012) (overruling the West Virginia Supreme Court of Appeals' categorical refusal to enforce arbitration agreements in cases alleging personal injury or wrongful death claims against nursing homes); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (overruling California law that deemed class-arbitration waivers unenforceable). Rather, this case stands for the proposition that states may set basic limits on what it will and will not infer an agent's authority to be.

The specific context of arbitration in nursing facilities, while not the exclusive situation in which states should hesitate to infer an agent's authority, provides a clear example of why a state may want to do so. Family members making critical decisions on behalf of their loved ones are under pressure to quickly find a long-term care placement because the need for such placement arises quickly and often is unplanned, leaving little time to investigate other options. Denese A. Vlosky et al., *"Say-so" As a Predictor of Nursing Home Readiness*, 93 J. Fam. & Consumer Sci. 59 (2001). The residents or their representatives are often unable to review the admission contract in full and contemplate the meaning and ramifications of each of its many provisions, particularly those that have nothing to do with the actual care and services provided by the facility or the costs charged by the facility. Many residents and their families are unaware they have signed such a document until after a dispute arises. Laura M. Owings & Mark N. Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing*

Home Admission Contracts, 43 Tenn. B.J. 20 (March 2007).

In recognition of the obstacles that arbitration agreements can pose to individuals seeking nursing facility care on behalf of themselves or their loved ones, the federal Centers for Medicare and Medicaid Services (CMS) sought to ban these agreements from the admission documents of nursing facilities accepting reimbursement from federal health insurance programs. Ctrs. for Medicare and Medicaid Servs., U.S. Dep't of Health and Human Servs., *Final Rule: Medicare and Medicaid Programs, Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68,688, 68,690 (Oct. 4, 2016) (hereinafter *CMS Final Rule*). Specifically, CMS recognized that "voluntary post-dispute arbitration agreements" (as opposed to the binding, pre-dispute agreements that are the subject of this case) are "the best way to balance the policy favoring arbitration with the need to protect [residents] from unfairly waiving their rights to a jury trial." *Id.* at 68,796.[3]

---

[3] The enforcement of this Rule has been temporarily enjoined by a federal court. *Am. Health Care Ass'n v. Burwell*, No. 16-cv-00233, 2016 U.S. Dist. LEXIS 154110 (N.D. Miss. Nov. 7, 2016). In dicta, the court questioned the "efficiency and fairness of the nursing home arbitration system." *Id.* at 6.

III. THE RIGHT TO ACCESS THE COURTS IS CRITICAL TO THE MANY VICTIMS OF ELDER ABUSE AND NEGLECT IN NURSING FACILITIES.

The specific context of this case illustrates why the Kentucky Supreme Court is justified in requiring explicit language before inferring an agent's authority to waive the principal's fundamental rights. The unfortunate reality is that nursing facility residents often suffer injury due to substandard care. As a group, nursing facility residents are more vulnerable to abuse and neglect due to their isolation from social networks, their congregate living setting, and their dependence on others to perform activities of daily living (ADLs), such as eating, bathing, dressing, and toileting, and their cognitive impairments. *See* Nat'l Research Council, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, 88-103 (Richard J. Bonnie & Robert B. Wallace eds., 2003) (reviewing studies on risk factors for abuse in different settings) (hereinafter *Elder Mistreatment*). Nationwide, more than 70% of nursing facility residents require assistance with two or more ADLs while more than 60% of nursing facility residents nationwide experience moderate to severe cognitive impairments. Ctrs. for Medicare and Medicaid Servs., U.S. Dep't of Health and Human Servs., *Nursing Home Data Compendium 2015 Edition*, 156, 185 (2015) (hereinafter *2015 Compendium*), https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/

Downloads/nursinghomedatacompendium_508-2015.pdf.

National databases of agencies tasked with enforcing minimum standards of safety in nursing facilities provide evidence of the significant levels of abuse and neglect occurring in nursing facilities. Approximately 7% of all complaints to the long-term care ombudsmen regarding nursing facilities were complaints of abuse, gross neglect, or exploitation. *See* U.S. Admin. on Aging, *2013 National Ombudsman Reporting System Data Tables*, Tbl. B-2, Tab A (2013), https://aoa.acl.gov/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2013/Index.aspx. In 2014, state inspections that determine a facility's compliance with health and safety regulations revealed that over 10% of the facilities surveyed were cited for causing actual harm to residents or putting them in immediate jeopardy, 3.2% for providing substandard care, 4.3% for using physical restraints, and 12.8% for failure to prevent or treat bedsores. *2015 Compendium* at 51, 114, 126, 138.

Furthermore, this data may underrepresent the scope of the problem. The complex challenges of collecting complete data on the prevalence of abuse in nursing facilities means that existing data, already showing unacceptable levels of abuse and neglect, capture only a small sliver of a vastly under-detected problem. *Elder Mistreatment* at 101; *see also Elder Justice and Protection: Stopping the Abuse: Hearing Before the Subcomm. on Aging of the Comm. on Health, Educ., Labor, and Pensions*, 108th Cong.

(Aug. 20, 2003) (statement of Sen. Christopher S. Bond, Chairman).

Even where a deficiency is detected and penalized, the administrative action may not have the desired deterrent effect on the facility against committing similar violations in the future. The Director of Health Care for the United States Government Accountability Office (GAO) testified before Congress that "[a] small but significant proportion of nursing homes nationwide continue to experience quality-of-care problems – as evidenced by the almost 1 in 5 nursing homes nationwide that were cited for serious deficiencies in 2006." U.S. Gov't Accountability Office, GAO-07-794T, *Nursing Home Reform: Continued Attention Is Needed to Improve Quality of Care in Small but Significant Share of Homes* 9 (2007), http://www.gao.gov/new.items/d07794t.pdf. It is quite clear that, despite efforts by federal authorities to strengthen their enforcement efforts, several nursing homes continue to repeatedly harm residents, and any sanctions imposed against these facilities "may have induced only temporary compliance in these homes." *Id.* at 15.

A 2007 GAO report on federal enforcement efforts further concludes that nursing facilities with the most serious quality problems—representing about half of the total sample—"cycled in and out of compliance" and continued to harm residents. U.S. Gov't Accountability Office, GAO-07-241, *Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents* 26

(2007), http://www.gao.gov/new.items/d07241.pdf. The types of deficiencies found in the facilities that cycled in and out of compliance included inadequate treatment or prevention of pressure sores, resident abuse, medication errors, and employing individuals previously convicted of abuse. *Id.* at 68. Further study by the GAO revealed that the total number of deficiencies increased over the previous several years, particularly in for-profit and multi-facility chains. U.S. Gov't Accountability Office, GAO-11-571, *Nursing Homes: Private Investment Homes Sometimes Differed from Others in Deficiencies, Staffing, and Financial Performance*, at Highlights (2011), http://www.gao.gov/assets/330/321067.pdf.

Nursing facilities routinely include binding pre-dispute arbitration provisions in admission agreements with the primary and unequivocal goal to reduce their overall exposure to legal liability. *See* Kelly Rice-Schild, *The Fairness in Nursing Home Arbitration Act: Hearing on S. 2838 Before the S. Subcomm. on Antitrust, Competition Pol'y, and Consumer Rights of the S. Comm. on the Judiciary and the Spec. Comm. on Aging*, 110th Cong., 2 (June 18, 2008), http://www.ahcancal.org/advocacy/testimonies/Testimony/AHCA_NCAL_StatementofKRSonArbitration.pdf; Aon Risk Sols., *Long Term Care General Liability and Professional Liability Actuarial Analysis*, 10 (2015), https://www.ahcancal.org/research_data/liability/Documents/2015%20General%20Liability%20and%20Professional%20Liability%20Actuarial%20Analysis%20Report.pdf (concluding that the resolution of claims with arbitration agreements in place cost 7% less than other claims).

Appellants have a particular incentive to use arbitration agreements in Kentucky, where both the frequency and average cost of claims tend to be higher. *Id.* at 30-31.

One of the primary goals of tort law, whether inside our outside a health care context, is to "deter the defendant from continuing its tortious conduct based on the risk that others injured will sue." Jill L. Lens, *Tort Law's Deterrent Effect and Procedural Due Process*, 50 Tulsa L. Rev. 115, 118 (2014). The introduction of an arbitration model to resolve medical malpractice claims, however, can undercut that goal. David Shieh, *Unintended Side Effects: Arbitration and the Deterrence of Medical Error*, 89 N.Y.U. L. Rev. 1806 (2014). In particular, the arbitration process can be "particularly susceptible to bias in favor of defendant healthcare providers." *Id.* at 1823-1824. When a tortfeasor cannot foresee any consequences for its practices causing harm to others, it has little, if any, incentive to correct the underlying practices.

As some commenters have observed, "the operating assumption of courts is not just that they will be there to...compensate an injured party, but that they will be sending a message heard clearly by those engaged in similar market practices." Andrew F. Popper, *In Defense of Deterrence*, 75 Alb. L. Rev. 181, 191 (2011). The total removal of a claim from the public court system stifles that message. As noted by CMS, many patient advocates reported that facilities employing arbitration clauses frequently believed that "they were immune to any legal

consequences" for mistreatment of residents "because of the likelihood they would prevail in binding arbitration." CMS Final Rule, 81 Fed. Reg. at 68,793. CMS also expressed concern that the mere existence of an arbitration agreement may deter residents from pursuing otherwise meritorious claims if "a resident or their representative does not believe that arbitration is a fair process." *Id.* at 68,794.

Given the high rates of abuse in nursing facilities, coupled with the inability of traditional administrative penalties to protect residents, lawsuits by nursing facility residents and their representatives can be critical tools in the battle against the abuse and neglect of older adults.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision of the Kentucky Supreme Court should be affirmed.

Dated: January 13, 2017

Respectfully submitted,

William Alvarado Rivera*
**Counsel of Record*
AARP FOUNDATION LITIGATION
601 E Street, N.W.
Washington, D.C. 20049
Tel. (202) 434-3392
warivera@aarp.org
Counsel for Amici Curiae

RECORD
AND
BRIEFS

FILED
JAN 13 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, dba WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, nka FOUNTAIN CIRCLE HEALTH AND REHABILITATION, *et al.*,
Petitioners,

v.

JANIS E. CLARK, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AND KENTUCKY JUSTICE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Julie Braman Kane
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, N.W.
Suite 200
Washington, DC 20001
(202) 965-3500

Kevin C. Burke
Jamie K. Neal
BURKE NEAL PLLC
2200 Dundee Road, Suite C
Louisville, KY 40205
(502) 709-9975
kevin@burkeneal.com
jamie@burkeneal.com

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
7916 Bressingham Drive
Fairfax Station, VA 22039
(202) 944-2874
robert.peck@cclfirm.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE FAA HAS NO APPLICATION TO THE TERMS OF A POWER OF ATTORNEY THAT DOES NOT DISCRIMINATE AGAINST ARBITRATION 4

A. The Preemptive Scope of the FAA Applies Only to Arbitration Agreements and State-Law Rules That Discriminate Against Those Agreements 4

B. Third Parties Generally May Not Commit a Non-Party to Arbitration 6

II. THE KENTUCKY SUPREME COURT APPLIED A GENERAL RULE, NOT AN ARBITRATION-SPECIFIC RULE, IN DETERMINING THE SCOPE OF AN AGENT'S AUTHORITY 10

A. Waivers of Constitutional Rights Must Be Voluntary, Knowing and Intelligent 10

B. Waiver Should Not Be Assumed from Silence 12

C. Kentucky's Ruling Reflects Firmly Established Principles of State Law Concerning Powers of Attorney 19

D. Kentucky's Supreme Court Has Not Demonstrated Hostility to Arbitration 23

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Aetna Ins. Co. v. Kennedy to Use of Bogash,
301 U.S. 389 (1937) 13, 14

Ally Cat, LLC v. Chauvin,
274 S.W.3d 451 (Ky. 2009) 7, 8, 9, 23

Am. Bureau of Shipping v. Tencara Shipyard S.P.A.,
170 F.3d 349 (2d Cir. 1999) 9

Am. Express Co. v. Italian Colors Restaurant,
133 S. Ct. 2304 (2013) 1

Arthur Andersen LLP v. Carlisle,
556 U.S. 624 (2009) 2, 4, 6

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 1, 5, 24

Benningfield v. Zinsmeister,
367 S.W.3d 561 (Ky. 2012) 23

Bowsher v. Merck & Co.,
460 U.S. 824 (1983) 7

Brady v. United States,
397 U.S. 742 (1970) 12

Bridas S.A.P.I.C. v. Gov't of Turkmenistan,
345 F.3d 347 (5th Cir. 2003) 9

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 5

CompuCredit Corp. v. Greenwood,
— U.S. —, 132 S. Ct. 665 (2012) 5

Conners v. Eble,
269 S.W.2d 716 (Ky. 1954) 7

Courtney Shoe Company v. E.W. Curd and Son,
142 Ky. 219, 134 S.W. 146 (1911) 8

DIRECTV, Inc. v. Imburgia,
136 S. Ct. 463 (2015) 25

Dimick v. Schiedt,
293 U.S. 474 (1935) 13

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 5, 6, 16, 17

Drury v. Assisted Living Concepts, Inc.,
262 P.3d 1162 (Or. App. 2011) 8

Duenas v. Life Care Centers of Am., Inc.,
336 P.3d 763 (Ariz. Ct. App. 2014) 8

Dunlap v. Com.,
435 S.W.3d 537 (Ky. 2013) 10

EEOC v. Waffle House, Inc.,
193 F.3d 805 (4th Cir. 1999),
rev'd other grounds, 534 U.S. 279 (2002) 7

Energy Home, Div. of S. Energy Homes, Inc. v. Peay,
406 S.W.3d 828 (Ky. 2013) 24

Ernst & Young, LLP v. Clark,
323 S.W.3d 682 (Ky. 2010) 24

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 5, 6, 14

Gaddie v. SunBridge Healthcare Corp.,
2009 WL 413126 (W.D. Ky. Feb. 18, 2009) 21

Gateway Coal Co. v. Mine Workers,
414 U.S. 368 (1974) 8

GGNSC Stanford, LLC v. Rowe,
388 S.W.3d 117 (Ky. App. 2012) 20

Harding v. Kentucky River Hardwood Co.,
265 S.W. 429 (Ky. 1924) 20

Hathaway v. Eckerle,
336 S.W.3d 83 (Ky. 2011) 24

Henry Clay Fire Ins. v. Denker's Executrix,
218 Ky. 68, 290 S.W. 1047 (1927) 8

Hodges v. Easton,
106 U.S. 408 (1882) 13

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 6

Ibe v. Jones,
836 F.3d 516 (5th Cir. 2016) 7

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000) .. 9

Jackson v. Commonwealth,
113 S.W.3d 128 (Ky. 2003) 11, 12

Javitch v. First Union Sec., Inc.,
315 F.3d 619 (6th Cir. 2003) 9

Johnson v. Pires,
968 So. 2d 700 (Fla. 4th Dist. Ct. App. 2007) . 8, 9

Johnson v. Zerbst,
304 U.S. 458 (1938) 10, 18

LP Pikeville, LLC v. Wright,
2014 Ky. App. LEXIS 57
(Ky. App. Apr. 4, 2014) 22

M.E.C. v. Com., Cabinet for Health & Family Servs.,
254 S.W.3d 846 (Ky. Ct. App. 2008) 17

Marshall v. Commonwealth,
60 S.W.3d 513 (Ky. 2001) 11

Martin v. Ewing,
164 S.E. 859 (W. Va. 1932) 7

Metcalf v. Metcalf,
193 S.W.2d 446 (Ky. 1946) 21

Milon v. Duke Univ.,
559 S.E.2d 789 (N.C.), *cert. dismissed*,
536 U.S. 979 (2002) 9

Montejo v. Louisiana,
556 U.S. 778 (2009) 10

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 5

Mt. Holly Nursing Ctr. v. Crowdus,
281 S.W.3d 809 (Ky. Ct. App. 2008) 15

Parklane Hosiery Co. v. Shore,
439 U.S. 322 (1979) 13

Parson v. Commonwealth,
144 S.W.3d 775 (Ky. 2004) 18

Parsons v. Bedford,
28 U.S. 433 (1830) 13

Perry v. Thomas,
482 U.S. 483 6

Ping v. Beverly Enterprises, Inc.,
376 S.W.3d 581 (Ky. 2012), *cert. denied*,
133 S.Ct. 1996 (2013) 17

Preferred Care, Inc. v. Bleeker,
2016 WL 6636854
(E.D. Ky. Nov. 8, 2016) 21, 22

Preferred Care, Inc. v. Howell,
2016 WL 4470746
(E.D. Ky. Aug. 19, 2016) 21, 22

Principal Life Ins. Co. v. Revalen Dev., LLC,
358 S.W.3d 451 (Tex. App.—Dallas 2012,
pet. denied) 7

Rice v. Floyd,
768 S.W.2d 57 (Ky. 1989) 19, 20, 21, 22, 23

Schnuerle v. Insight Communs., Co. L.P.,
376 S.W.3d 561 (Ky. 2012) 24, 25

Siopes v. Kaiser Found. Health Plan, Inc.,
312 P.3d 869 (Haw. 2013) 8

Smith v. Snow,
106 S.W.3d 467 (Ky. App. 2002) 19

Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88 (2d Cir. 1999), *cert. denied*, 531 U.S. 815 (2000) . . . 7

Spalding v. St. Joseph's Industrial School for Boys,
54 S.W. 200 (Ky. 1899) 19

Steelworkers v. Warrior & Gulf Nav. Co.,
363 U.S. 574 (1960) 6

Thomson-CSF v. American Arbitration Association,
64 F.3d 773 (2d Cir. 1995) 9

Trippe Mfg. Co. v. Niles Audio Corp.,
401 F.3d 529 (3d Cir. 2005) 9

U.S. Fidelity Co. v. McGinnis,
145 S.W. 1112 (Ky. 1912) 19

United States v. Robertson,
45 F.3d 1423 (10th Cir. 1995), *cert. denied*,
516 U.S. 844, 116 (1995) 11

Utilities Electrical Machine Corp. v. Joseph E. Seagram & Sons, 187 S.W.2d 1015 (Ky. 1945) .. 7

Wright v. LP Pikeville, LLC,
2014-SC-000238-DG 22

Zurich Am. Ins. Co. v. Watts Indus., Inc.,
417 F.3d 682 (7th Cir. 2005) 9

CONSTITUTIONS AND STATUTES

9 U.S.C. § 1 *et seq.* ..... *passim*

9 U.S.C. § 2 5

Ky. Const. § 1 15

Ky. Const. § 14 17

Ky. Rev. Stat. § 199.500(1) 18

Ky. Rev. Stat. § 311.725(1) & (4) 18

Ky. Rev. Stat. § 386.093 ..... 20, 21, 22

Ky. Rev. Stat. § 386.093(6) 22

Ky. Rev. Stat. § 387.500 21

Ky. Rev. Stat. § 387.500(2) 20

Ky. Rev. Stat. § 387.660 ..... 21, 22

Ky. Rev. Stat. § 402.020 18

Ky. Rev. Stat. § 402.080 18

Ky. Rev. Stat. § 402.100 18

Ky. Rev. Stat. § 625.043A 17, 18

1998 Ky. Acts 421 22

2000 Ky. Acts 27 22

OTHER AUTHORITIES

Alexander Hamilton, Federalist No. 83 (Clinton Rossiter ed., New Am. Lib. 1961) 13

Leonard Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960) 13

21 R. Lord, Williston on Contracts (4th ed. 2001). . 6

Joseph Story, Commentaries on the Constitution of the United States (R. Rotunda & J. Nowak eds. 1987) (1833) 13

Summary of Uniform Power of Attorney Act, available at Uniform Law Commission website, http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney 19

INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, and the Kentucky Justice Association respectfully submit this brief as *amici curiae* in support of Respondents.

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits and personal injury actions. Throughout its history, AAJ has served as a leading advocate of the right to trial by jury, as well as for access to the courts and for the preservation of protections enjoyed by ordinary citizens that is afforded by the common law and state tort law.

In serving that purpose, AAJ represents its members and their clients in matters before the courts, Congress, and the Executive Branch. To that end, AAJ regularly files *amicus* briefs in cases that raise issues of vital concern to its members and their clients, including cases involving forced arbitration. *See, e.g.*, *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

The Kentucky Justice Association (KJA) similarly represents its members and their clients in improving the quality of legal representation for Kentucky

---

[1] The parties have consented in writing to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

families by providing superior legal education and by keeping abreast of legislative and judicial proceedings. Members of the Kentucky Justice Association are dedicated to protecting the health and safety of Kentucky families, to enhancing consumer protection, and to preserving each and every citizen's right to trial by jury.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Neither the Federal Arbitration Act nor this Court's precedents override the Commonwealth of Kentucky's authority to insist that an agent cannot waive a principal's fundamental constitutional rights unless the agreement specifically cloaks the agent with that authority. After all, nothing in the FAA "purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

In this case, Kindred Nursing Centers seeks to expand the reach of the FAA to agency agreements that define the scope of an agent's authority and that do not involve or mention arbitration. Kindred effectively insists that state contract law that is not specific to arbitration must still be preempted if it has an adverse effect on whether a dispute will be arbitrated. While precedents do prevent state-law contract rules from discriminating against arbitration, the facts of this case do not present a case of differential treatment for arbitration. This Court should decline Kindred's invitation to inflate the preemptive scope of the FAA so that state law may not insist on affirmative grants of

authority when constitutional rights are waived through an agent.

Here, the powers of attorney at issue do not evince any intent on the part of the parties to arbitrate anything. More fundamentally, they do not authorize the agents to engage in any actions that constitute a waiver of constitutional rights. Instead, it can safely be assumed that in executing the agreements the parties to them did not contemplate an issue dealing with constitutional rights. Because an agent's consent to an arbitration agreement is only valid when the agent has received the requisite authority from the principal to submit any dispute to arbitration and because waiver of a constitutional right must be voluntary, intelligent and knowing, insistence that the authority to waive a constitutional right be manifest does not demonstrate hostility to arbitration but, instead, reflects a fundamental and commonplace feature of contract law that agreements be made with proper authority and reflect a meeting of the minds, a concern that takes heightened importance when fundamental constitutional rights are concerned.

ARGUMENT

I. THE FAA HAS NO APPLICATION TO THE TERMS OF A POWER OF ATTORNEY THAT DOES NOT DISCRIMINATE AGAINST ARBITRATION.

A. The Preemptive Scope of the FAA Applies Only to Arbitration Agreements and State-Law Rules That Discriminate Against Those Agreements.

In this case, Kindred Nursing Centers [hereinafter, "Kindred"] seeks an extraordinary, extratextual expansion of the preemptive scope of the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 1 *et seq.* In doing so, Kindred asserts that Congress prohibited state-law rules from singling out arbitration for different treatment or for interpreting contracts in a manner that discriminates against arbitration. Pet. Br. 10-11. While that statement is true as far as it goes, it has scant relevance to the facts and circumstances presented in this case. Kindred myopically focuses on the *results* of the decision below because of its effect on arbitration and asserts that Kentucky has invented a rule designed to discriminate against arbitration. To the contrary, the Kentucky Supreme Court rested its decision on an entirely appropriate, non-arbitration rationale. After all, nothing in the FAA "purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen*, 556 U.S. at 630.

As this Court has explained, "agreements to arbitrate [may] be invalidated by 'generally applicable

contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011) (citation omitted).

For that reason, discerning the FAA's preemptive scope properly focuses on the arbitration agreement, its formation, and the defenses raised to it. This Court has explained that "the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 111 (2001). It embodies a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983), and "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp. v. Greenwood,* --- U.S. ---, 132 S. Ct. 665, 669 (2012). Thus, this Court has declared that "Congress precluded States from singling out arbitration provisions for suspect status." *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996).

These precedents reflect Congress's intent, as articulated in Section 2 of the FAA, which also acknowledges that arbitration agreements are not valid, irrevocable or enforceable when the agreement contravenes grounds that "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Under Section 2's command, courts determine whether a valid arbitration agreement exists through application of "ordinary state-law principles that govern the formation of contracts." *First Options of*

Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). *See also Perry v. Thomas,* 482 U.S. 483, 492 n. 9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."). Thus, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Cassarotto,* 517 U.S. at 687 (1996). On the other hand, this Court has instructed that arbitration agreements may not be invalidated "under state laws applicable only to arbitration provisions." *Id.*

B. Third Parties Generally May Not Commit a Non-Party to Arbitration.

It is axiomatic that a third party generally may not commit a non-party to a contractual relationship, including to an arbitration agreement. *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83 (2002), quoting *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 582 (1960) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). There are of course exceptions to that general rule, such as where "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" *Arthur Andersen,* 556 U.S. at 631, quoting 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001).

Courts, however, "should be wary of imposing a contractual obligation to arbitrate on a non-contracting party." *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 97 (2d Cir. 1999), *cert. denied*, 531 U.S. 815 (2000). That wariness, along with the rules that prevent application to a non-party, reflect the fundamental principle that "a meeting of the minds [is] the most essential factor to constitute a binding contract." *Utilities Electrical Machine Corp. v. Joseph E. Seagram & Sons*, 187 S.W.2d 1015, 1018 (Ky. 1945). *See also Bowsher v. Merck & Co.*, 460 U.S. 824, 864 (1983) (White, J., concurring in part, dissenting in part) ("A contract, after all, is a meeting of the minds."); *Martin v. Ewing*, 164 S.E. 859, syl. pt. 1 (W. Va. 1932) ("A meeting of the minds of the parties is a sine qua non of all contracts.").

In fact, in most states, a meeting of the minds must exist with respect to *all essential terms*. *See, e.g., Ibe v. Jones*, 836 F.3d 516, 524 (5th Cir. 2016) (applying Texas law and requiring "'an offer and acceptance and a meeting of the minds on all essential terms.'") (quoting *Principal Life Ins. Co. v. Revalen Dev., LLC*, 358 S.W.3d 451, 454–55 (Tex. App.—Dallas 2012, *pet. denied*)); *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 816 (4th Cir. 1999) (same, applying South Carolina law), *rev'd other grounds*, 534 U.S. 279 (2002). Generally applicable Kentucky contract law is stringent in this regard: "To create a valid, enforceable contract, there must be a voluntary, complete assent by the parties having capacity to contract." *Conners v. Eble*, 269 S.W.2d 716, 717–18 (Ky. 1954). There "must be a meeting of the minds to effect assent." *Id.* Furthermore, "[a]ssent to be bound by the terms of an agreement must be expressed." *Ally Cat, LLC v. Chauvin*, 274

S.W.3d 451, 456 (Ky. 2009), *citing Courtney Shoe Company v. E.W. Curd and Son,* 142 Ky. 219, 134 S.W. 146 (1911); *Henry Clay Fire Ins. v. Denker's Executrix,* 218 Ky. 68, 290 S.W. 1047 (1927). This Court's jurisprudence takes that concept into account as it has held that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 374 (1974).

There can be no meeting of the minds when a party has not agreed to arbitrate a dispute, directly or through an agent. *See, e.g., Duenas v. Life Care Centers of Am., Inc.,* 336 P.3d 763, 774-75 (Ariz. Ct. App. 2014) (authorized agent's agreement to arbitrate dispute with nursing home during first two residencies did not govern claims arising out of resident's subsequent two admissions to facility, for which representative did not sign arbitration agreements, because the original agreements made each stay a separate event); *Siopes v. Kaiser Found. Health Plan, Inc.,* 312 P.3d 869, 877 (Haw. 2013) (injured employee not bound by employer's agreement to arbitrate insurance dispute with health plan when his enrollment "form did not contain an arbitration agreement or suggest that one existed, the Group Agreement containing the arbitration provision was not signed by [him], and there was no indication that [he received,] reviewed and understood its contents."); *Drury v. Assisted Living Concepts, Inc.,* 262 P.3d 1162, 1163 (Or. App. 2011) (son who signed assisted living residency agreement containing arbitration clause but was not decedent's guardian, conservator, personal representative, or trustee, could not bind estate to arbitration); *Johnson v. Pires,* 968

So. 2d 700, 702 (Fla. 4th Dist. Ct. App. 2007) (chief operating officer of company who signed arbitration agreement only in a corporate capacity is not bound as an agent to arbitrate individual claim against him); *Milon v. Duke Univ.*, 559 S.E.2d 789 (N.C.), *cert. dismissed,* 536 U.S. 979 (2002) (hospital could not compel arbitration of medical-malpractice claim when wife of plaintiff signed arbitration agreement for patient without authority). *Cf. Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 688 (7th Cir. 2005) ("A corporate relationship is generally not enough to bind a nonsignatory to an arbitration agreement."). Kentucky law is in accord. *Ally Cat,* 274 S.W.3d at 456 (warrantor could not compel arbitration pursuant to warranty agreement where the signing party did not indicate her representative capacity on behalf of corporate real party in interest).

The Second Circuit has pioneered an inquiry, widely adopted elsewhere, that looks to five theories arising out of common law principles of contract and agency law, under which a signatory to an arbitration agreement may bind a non-party. Those five theories are: "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999), *citing Thomson–CSF v. American Arbitration Association*, 64 F.3d 773, 776 (2d Cir. 1995). *See also Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 417 (4th Cir. 2000). *But see Bridas S.A.P.I.C. v. Gov't of Turkmenistan,* 345 F.3d 347, 356 (5th Cir. 2003) (adopting six theories and

adding third-party beneficiary). In this case, only agency is at issue, and disposition of the Question Presented depends on the scope of the agent's authority.

II. THE KENTUCKY SUPREME COURT APPLIED A GENERAL RULE, NOT AN ARBITRATION-SPECIFIC RULE, IN DETERMINING THE SCOPE OF AN AGENT'S AUTHORITY.

A. Waivers of Constitutional Rights Must Be Voluntary, Knowing and Intelligent.

This Court should hold that Section 2's nondiscrimination principle does not preempt Kentucky's requirement that a power of attorney specify a waiver of constitutional rights in order for an agent to assume such authority. The decision below does not involve defenses only applicable to arbitration but a straightforward determination of the scope of an agent's authority to waive a principal's constitutional rights. Both this Court's and Kentucky's jurisprudence hold that constitutional rights are not waived unless it is done voluntarily, knowingly, and intelligently. *See, e.g., Montejo v. Louisiana,* 556 U.S. 778, 786 (2009); *Dunlap v. Com.,* 435 S.W.3d 537, 561-62 (Ky. 2013), *as modified* (Feb. 20, 2014). The jurisprudence has a venerable lineage unrelated to arbitration. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

In fact, in the context of a criminal prosecution, trial judges do not just take the word of the lawyer for the defendant that his client has waived constitutional rights to accept a plea bargain. Instead, the judge makes a pointed and extensive inquiry to make sure

that the defendant fully understands his rights and voluntarily waives them. For example, in *Jackson v. Commonwealth*, 113 S.W.3d 128, 130 (Ky. 2003), counsel for the defendant told the trial judge that the defendant had waived his right to a jury trial in favor of a bench trial. Upon review, the Kentucky Supreme Court found "[n]either the trial court nor defense counsel made any inquiry of [Defendant] regarding his consent to the waiver, nor did [Defendant] acknowledge the waiver personally on the record." *Id.* Relying on precedent that holds that "a trial court may not presume a waiver of the right to a jury trial from a silent record, and ... a court should not presume acquiescence in the loss of a constitutional right," *Marshall v. Commonwealth,* 60 S.W.3d 513, 522 (Ky. 2001), the *Jackson* Court, following federal precedent and seeking assurance that invited error had not occurred, remanded the case for an evidentiary hearing in which the prosecution had the burden to prove that a voluntary, intelligent, and knowing waiver took place. 113 S.W.3d at 131, 136.

In the course of its analysis, the *Jackson* Court found "some guidance in the federal courts' interpretation of Federal Rule of Criminal Procedure (FRCP) 23(a)." *Id.* at 132. Among the pertinent considerations imposed by the federal rule are whether the "defendant knowingly, voluntarily, and intelligently waive[d] his right to trial by jury" and whether the waiver was in writing. *Id., citing United States v. Robertson,* 45 F.3d 1423, 1431 (10th Cir. 1995), *cert. denied,* 516 U.S. 844, 116 (1995). The Kentucky Court noted that

> most United States Courts of Appeals have not required strict compliance with FRCP 23(a)'s "in writing" provision and have found the failure to secure the waiver in writing to be non-prejudicial in cases "where the record clearly reflects that the defendant 'personally gave express consent in open court, intelligently and knowingly.'"

Id. at 133 (footnotes and citations omitted).

To accomplish that voluntary, intelligent and knowing waiver, the federal appellate courts "strongly urge" trial judges "to engage the defendant in a colloquy concerning waiver of a jury trial" that is detailed in its description of the jury-trial and the consequences of waiver. *Id.* No doubt, this reflects this Court's insistence that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748 (1970). Kentucky has every right to be equally insistent about instruments allowing agents to waive state constitutional rights on behalf of principals.

B. Waiver Should Not Be Assumed from Silence.

Constitutional rights hold a special place in the pantheon of laws that govern our relationships. While status as a state constitutional right does not immunize a law from federal preemption, it does inform a state's ordinary contract rules, which are not subject to federal preemption. Kentucky chose uniquely strong language in delineating its jury-trial right.

Section 7 of the Kentucky Constitution provides that "[t]he ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate."

The special place that the jury-trial holds in American constitutional law is well documented. Only the right to trial by jury, not freedom of speech or freedom of religion, was "universally secured by the first American state constitutions." Leonard Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 281 (1960), *quoted in, Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting). The absence of a civil-jury guarantee from the new U.S. Constitution was "one of the strongest objections" taken against ratification. *Parsons v. Bedford,* 28 U.S. 433, 445 (1830) (Story, J.). *See also* Alexander Hamilton, Federalist No. 83, 495 (Clinton Rossiter ed., New Am. Lib. 1961) (calling it the objection that has "met with most success"). As Justice Story related, without the promise of a civil-jury trial, the Constitution never would have received ratification. Joseph Story, Commentaries on the Constitution of the United States 653 (R. Rotunda & J. Nowak eds. 1987) (1833).

As a result, this Court has long held that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt,* 293 U.S. 474, 486 (1935). That adherence to trial by jury has spawned an interpretative rule articulated by the first Justice Harlan for this Court, that, as a fundamental guarantee, "every reasonable presumption should be indulged against its waiver." *Hodges v. Easton,* 106 U.S. 408, 412 (1882). *See also Aetna Ins. Co. v. Kennedy to Use of Bogash,* 301 U.S.

389, 393 (1937) (footnoted omitted) ("as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.").

Kentucky's application of the same principles is consistent with this Court's jurisprudence. In *First Options,* this Court stated that

> given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

514 U.S. at 945. It is no stretch to hold similarly that courts ought to hesitate to interpret silence as to the waiver of constitutional rights in an agency agreement to permit waiver. The *First Options* Court acknowledged that an agreement that designates at least some issues for arbitration constitutes indicia that "the parties likely gave at least some thought to the scope of arbitration." *Id.* The same cannot be said of the agency agreements here, which were entirely silent on the waiver of constitutional rights or the authorization to submit disputes to arbitration, which would also constitute a waiver of the relevant constitutional rights.

Instead, it can safely be assumed that in executing the agreements the parties to them never contemplated an issue dealing with constitutional rights. Nearly a

decade ago, Kentucky's courts had held that a patient's health-care surrogate could not commit a patient to arbitration absent specific or apparent authority. *Mt. Holly Nursing Ctr. v. Crowdus,* 281 S.W.3d 809 (Ky. Ct. App. 2008), *rev. denied* (May 13, 2009).

It naturally follows, as the court below held, that an agent's consent to an arbitration agreement is only valid when the agent has specifically received the requisite authority from the principal. Insistence that the authority be manifest does not demonstrate hostility to arbitration but, instead, reflects a fundamental and commonplace feature of contract law that agreements be made with proper authority and reflect a meeting of the minds, a concern that takes heightened importance when fundament constitutional rights are concerned.

Kindred sets up a weak straw man argument to counter the claim that Kentucky has asserted a general rule involving constitutional rights. It asserts that the Kentucky Supreme Court's constitutional rights declaration "does not apply to other constitutional rights that are relevant to contracting—such as Kentucky's constitutional right 'of acquiring and protecting property.'" Pet. Br. 11, 25-26, citing Ky. Const. § 1 and adopting the view of the dissent below, Pet. App. 93a (Abramson, J., dissenting). The powers of attorney at issue here actually specified that the attorneys-in-fact were delegated authority to make contracts concerning property.[2] Given that the rule

---

[2] For example, in one of the consolidated cases, attorney-in-fact Belinda Whisman received specified authority to mortgage property and "to institute or defend suits concerning [the

announced concerning property rights was therefore observed in the subject powers of attorney, there would be no difficulty in doing so with respect to other constitutional rights, either specifically or more broadly.

Kindred attempts to evade this refutation of its argument by asserting that a cause of action is a species of personal property and thus within the authority of an attorney-in-fact to alienate. Pet. Br. 23, citing Pet. App. 36a. The court below properly addressed that argument, noting that the authority "to institute or defend suits concerning property rights" contained in the power of attorney, neither authorizes the initiation of an arbitration proceeding, nor permits the attorney in fact to waive a jury-trial, either through a bench trial over property rights or an arbitration proceeding. Pet. App. 30a-32a, 43a. Moreover, constitutional rights, as the Kentucky Supreme Court pointed out, "are decisively *not* 'personal property' as we have defined the term." Pet. App. 37a (emphasis in orig.).

Kindred also mistakenly asserts that this Court's decision in *Cassarotto* all but decides this case. Pet. Br.

---

principal's] property or rights." Pet. App. 14a. Another, Janis Clark, was authorized "[t]o lease, sell, or convey any real or personal property" of the principal, as well as mortgage any property," "retain and release all liens on real or person [sic] property," or "institute or defend suits concerning my property or rights." Pet. App. 18a-19a. Finally, the third one, Beverly M. Wellner, was authorized to "receive, take receipt for, and hold in possession, manage and control all property, both real and personal," including full power to "sell, mortgage or pledge, assign transfer, invest and reinvest" such property." Pet. App. 21a.

18. In *Casarotto,* this Court concluded that § 2 of the FAA preempted a state law requiring that, absent a conspicuous notice of an arbitration clause on the first page of the contract, the contract was not arbitrable. 517 U.S. at 681. Borrowing language from the equal-protection doctrine, the Court reasoned that States could not, consistent with § 2, "singl[e] out arbitration provisions for suspect status." *Id.* at 687.

The Kentucky Supreme Court's rule does nothing comparable to what was at issue in *Cassarotto*. Plainly, Kentucky's rule concerning the waiver of constitutional rights is not an arbitration-specific rule. In *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), *cert. denied,* 133 S. Ct. 1996 (2013), the Kentucky Supreme Court observed that a power of attorney required express authorization to settle claims or disputes, even outside the arbitration context, in order to assure that the right to open courts, secured by Ky. Const. § 14, is not inadvertently waived. *Id.* at 593. Certainly, no attorney can settle a client's case without specific approval.

While Kindred dismisses that array of other constitutional rights that may be waived but only explicitly through a power of attorney and are unrelated to arbitration as "inflammatory and unsupportable analogies," Pet. Br. 27, the assertion is without merit. *See, e.g., M.E.C. v. Com., Cabinet for Health & Family Servs.*, 254 S.W.3d 846 (Ky. Ct. App. 2008) (holding that social services agency had no authority to terminate parental rights merely due to parent's incarceration, when the agency failed to establish abuse and neglect or that termination was in the children's best interest). *See also* Ky. Rev. Stat.

§ 625.043A (establishing that a parent can only voluntarily terminate parental rights by order of a Circuit Court, after a hearing).

Similarly, there is no basis under Kentucky law for an attorney-in-fact—even one with the authority "to do and perform for me in my name all that I might if present" or "to make any contracts or agreements that I might make if present"—to waive the principal's civil rights;[3] put a child up for adoption;[4] consent to abort a pregnancy;[5] or consent to an arranged marriage.[6] *Id.* As

---

[3] "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Parson v. Commonwealth*, 144 S.W.3d 775, 792 (Ky. 2004), quoting *Johnson*, 304 U.S. at 464.

[4] Adoption requires a Court order based on "voluntary and informed consent" of the natural parent, unless the parent has been "adjudged mentally disabled" for not less than one year or the parent's rights have been voluntarily or involuntarily terminated by the Court. Ky. Rev. Stat. § 199.500(1).

[5] Kentucky law requires "voluntary and informed written consent of the woman upon whom the abortion is to be performed or induced," except in cases of "a medical emergency or medical necessity." Ky. Rev. Stat. § 311.725(1) & (4).

[6] In Kentucky, no "marriage shall be solemnized without a license therefor." Ky. Rev. Stat. § 402.080. The marriage license can only be issued by a county clerk and must include a "statement signed by both parties swearing that, to the best of their knowledge, the information provided on the form is correct." *Id.* at § 402.100. And marriage is "prohibited and void" with "a person who has been adjudged mentally disabled by a court of competent jurisdiction." *Id.* at § 402.020.

a matter of state law, the attorney-in-fact instruments in this case would not bind the principal in any of the specified circumstances because generally applicable state law requires more.

C. Kentucky's Ruling Reflects Firmly Established Principles of State Law Concerning Powers of Attorney.

Kentucky has long held that a power of attorney must be strictly construed. *See U.S. Fidelity Co. v. McGinnis,* 145 S.W. 1112, 1114 (Ky. 1912) ("a formal instrument conferring authority will be strictly construed, and can be held to include only those powers which are plainly given and those which are necessary, essential and proper to carry out those expressly given."). In fact, "[p]owers of attorney delegating authority to perform specific acts, and also containing general words, are limited to the particular acts authorized." *Id.* Kentucky law further places a number of authorities off-limits. For example, Kentucky law prohibits an attorney-in-fact from ever having the authority to make a will for the principal, *Smith v. Snow*, 106 S.W.3d 467, 470 (Ky. App. 2002) (citing *Spalding v. St. Joseph's Industrial School for Boys*, 54 S.W. 200 (Ky. 1899)). Unlike many states, Kentucky has not adopted the Uniform Power of Attorney Act. *Rice v. Floyd*, 768 S.W.2d 57, 60 (Ky. 1989). The Uniform Act gives specific powers to attorneys-in-fact to compromise or settle claims and to submit claims for alternative dispute resolution.[7] That authority is

---

[7] *See* Summary of Uniform Power of Attorney Act, available at Uniform Law Commission website, http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney (last visited January 5,

absent here. Given these restrictions, Kentucky law requires that those dealing with attorneys-in-fact do so at their own peril. *Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429, 432 (Ky, 1924) ("Whenever one man presents himself as the agent of another, it is the duty of all who may have transactions with him, in his representative character, to inquire into the extent of his authority, and they must deal with him at their peril.")

Nothing in the lone statute governing attorneys-in-fact, Ky. Rev. Stat. § 386.093, mentions the civil or constitutional rights of the principal. As the Kentucky Court of Appeals has explained, "incompetent adults are *entitled to court oversight*, via guardianship proceedings, to guarantee their interests are protected because they are not able to do so themselves." *GGNSC Stanford, LLC v. Rowe*, 388 S.W.3d 117, 123 (Ky. App. 2012) (citing Ky. Rev. Stat. § 387.500(2)) (emphasis added).

Nearly thirty years ago, the Kentucky Supreme Court explained the important differences between statutory guardians and attorneys-in-fact, in a case that had *nothing* to do with arbitration agreements. In *Rice,* 768 S.W.2d at 60-61, conspicuously absent from Kindred's brief, the Kentucky Supreme Court held that a "durable power of attorney is not a substitute for the appointment of a guardian." As the Court explained in *Rice,* Ky. Rev. Stat. § 386.093 was designed to abrogate common law rules regarding attorneys-in-fact. *Id.* at 58.

2017) (showing that 21 states have adopted the Uniform Power of Attorney Act).

In identifying the different rights and responsibilities of an attorney-in-fact and a statutory guardian, the Court explained that it "was not the purpose of KRS 386.093 to permit an attorney-in-fact to undertake all the obligations of a legally appointed guardian." *Id.* at 59, citing Ky. Rev. Stat. §§ 387.500, 387.660. Indeed, the Court held that the "legal and personal requirements of a disabled person are not well satisfied by an attorney-in-fact as they might be by a guardian." *Id.* at 60. Thus, under Kentucky law, the "process of appointing a guardian or conservator is the legal means by which the court applies *due process* to avoid the possible invasion of *civil or legal rights* in regard to a partial disability." *Id.* at 59 (emphasis added) (also noting that "courts have always had the inherent duty to protect the rights and interests of incompetents," citing *Metcalf v. Metcalf*, 193 S.W.2d 446 (Ky. 1946)). The Court even noted that a person deemed "incompetent cannot be sued and an attorney-in-fact cannot defend an action on behalf of an incompetent ... Defense must be completed by a legally appointed guardian or committee." *Rice*, 768 S.W.2d at 60 (citing Ky. CR § 17.03).

Federal Courts in Kentucky have also recognized the significant distinctions between individuals acting under a power of attorney and statutorily-appointed guardians. *Gaddie v. SunBridge Healthcare Corp.*, 2009 WL 413126, at *2 (W.D. Ky. Feb. 18, 2009) ("there is a significant distinction between the powers of a guardian and a durable power of attorney"). Kindred glosses over the differences, but the cases it relies on further support the distinction. *See* Pet. Br. 22, citing *Preferred Care, Inc. v. Howell*, 2016 WL 4470746, at *3 (E.D. Ky. Aug. 19, 2016); *Preferred Care, Inc. v.*

Bleeker, 2016 WL 6636854, at *4 (E.D. Ky. Nov. 8, 2016).) For example, the Eastern District of Kentucky recently noted that "when a court must decide whether an attorney-in-fact has the power to do something, the court looks to the document to see what the principal has allowed." *Howell*, 2016 WL 4470746 at *4. But a "guardian, unlike an attorney-in-fact, receives his power from the state—not from the ward himself." *Id.* Therefore, "Kentucky law then defines what the guardian can do, and the court can further limit his power." *Id.* (citing Ky. Rev. Stat. § 387.660).[8]

Since the Kentucky Supreme Court's decision in *Rice*, the Kentucky legislature has amended the power of attorney statute, Ky. Rev. Stat. § 386.093, twice. *See* 1998 Ky. Acts 421; 2000 Ky. Acts 27. The only expansion of the substantive powers of an attorney-in-fact in those amendments is a 2000 change adding a provision that "a durable power of attorney may authorize an attorney in fact to make a gift of the principal's real or personal property to the attorney in fact or to others if the intent of the principal to do so is unambiguously stated on the face of the instrument." Ky. Rev. Stat. § 386.093(6). Thus, the Kentucky Supreme Court's holding that an attorney-in-fact is not equivalent to, and does not have the extensive powers

---

[8] Even before the decision below, the Kentucky Court of Appeals held that a statutorily-appointed guardian, who has "the broadest possible agency relationship," ***does*** have the authority to enter into an arbitration agreement on behalf of the principal. *LP Pikeville, LLC v. Wright*, 2014 Ky. App. LEXIS 57, *10 (Ky. App. Apr. 4, 2014). The Kentucky Supreme Court accepted *LP Pikeville* for discretionary review, but has stayed the case pending the outcome here. *Wright v. LP Pikeville, LLC*, 2014-SC-000238-DG.

of, a statutorily-appointed guardian is also the intent of the Kentucky Legislature. *See Benningfield v. Zinsmeister*, 367 S.W.3d 561, 564 (Ky. 2012) ("[W]hen a statute has been construed by a court of last resort and the statute is substantially reenacted, the Legislature may be regarded as adopting such construction.").

Notably, *Rice* arose in the context of a dispute between the attorney-in-fact for Mayme Floyd, who had been appointed by way of a durable power of attorney, and Ms. Floyd's daughter, who sought to have herself appointed guardian of Ms. Floyd. 768 S.W.2d at 57. *Rice* did not arise in the context of any dispute regarding arbitration agreements. Thus, the limitations that Kentucky law places on attorneys-in-fact cannot be said to arise from, or even relate to, any disregard for arbitration. Kindred's misunderstanding of the state-law limitations on attorneys-in-fact, and Kindred's failure to require assent to arbitration by one with express authority, do not warrant a revision of Kentucky law to require contract formation between Kindred and an unauthorized agent.

D. Kentucky's Supreme Court Has Not Demonstrated Hostility to Arbitration.

Kindred's claim of Kentucky Supreme Court hostility to arbitration rings false in light of its jurisprudence. State law "favors the enforcement of arbitration agreements." Pet. App. 25a, citing *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 457 (Ky. 2009). It further recognized that "[d]oubts about the scope of issues subject to arbitration should be resolved in favor of arbitration." *Id.* at 24a-25a.

Justice Daniel Venters, who wrote the majority decision, has authored five decisions involving the FAA. The decision below is the ***only one*** of those decisions in which Justice Venters held that arbitration was not required. *See Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 834 (Ky. 2013) (applying the FAA and holding that merger clause in purchase agreement did not defeat later-entered arbitration agreement); *Schnuerle v. Insight Communs., Co. L.P.*, 376 S.W.3d 561, 565 (Ky. 2012) (holding "general arbitration provision is not unconscionable," applying *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and "comports with Kentucky's public policy preference favoring arbitration")); *Hathaway v. Eckerle*, 336 S.W.3d 83, 87-88 (Ky. 2011) (finding that choice of law provision in sales agreement selecting FAA is controlling and allows court to disregard Kentucky's Uniform Arbitration Act); *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 694 (Ky. 2010) (class action plaintiffs agreed to arbitration even though they did not directly sign arbitration agreement).

Schnuerle is particularly noteworthy. It arose from a service agreement between consumers and Insight Communications for broadband Internet services. Justice Venters, writing for the majority, first held that a choice of law provision in the service agreement selecting New York law was not enforceable because "Kentucky had the greater interest in" the issues. 376 S.W.3d at 567. Nonetheless, the Court went on to apply both Kentucky law *and* the FAA, ultimately enforcing an arbitration clause in the service agreements. Specifically, the Court explained that a "decision to invalidate or otherwise disregard the anti-class action provision of Insight's Service Agreements on grounds of

unconscionability would undermine the federal policy favoring arbitration, and would offend the preemption provisions of the Federal Arbitration Act." *Id.* at 573. Thus, Justice Venters, and the Kentucky Supreme Court as a whole, have a strong history of enforcing the FAA and supporting arbitration. Kindred's arguments that the Kentucky Supreme Court is a rogue court with an agenda to evade the FAA and federal law are completely unfounded.

Schnuerle also undermines Kindred's reliance on *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). *See* Pet. Br. 20-21. In *Imburgia*, this Court held that the FAA precluded the California Court of Appeal's interpretation of the term "law of your state" to exclude the preemptive force of federal law because "nothing in the [state court's] reasoning suggest[ed]" that a court in that state "would reach the same interpretation of 'law of your state' in any context other than arbitration." 136 S. Ct. at 469. However, *Schnuerle* confirms that the Kentucky Supreme Court has refused to enforce otherwise valid contractual choice of law provisions in favor of Kentucky law—*except* when the FAA applies.

Instead of demonstrating a hostility to arbitration, as the court below stated, the Kentucky "rule merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights regardless of the context in which they arise." Pet. App. 47a-48a.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
7916 Bressingham Drive
Fairfax Station, VA 22039
(202) 944-2874
robert.peck@cclfirm.com

Julie Braman Kane
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, N.W.
Suite 200
Washington, DC 20001
(202) 965-3500

Kevin C. Burke
Jamie K. Neal
Burke Neal PLLC
2200 Dundee Road, Suite C
Louisville, KY 40205
(502) 709-9975
kevin@burkeneal.com
jamie@burkeneal.com

Counsel for Amici Curiae

January 13, 2017

CORD
AND
RIEFS

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, ET AL., PETITIONERS

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE AMERICAN HEALTH CARE ASSOCIATION AND THE KENTUCKY ASSOCIATION OF HEALTH CARE FACILITIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

JAMES F. SEGROVES
Counsel of Record
KELLY A. CARROLL
DAVID J. VERNON
HOOPER, LUNDY & BOOKMAN, PC
401 Ninth Street, NW, Suite 550
Washington, DC 20004
(202) 580-7700
jsegroves@health-law.com

ELIZABETH A. JOHNSON
KENTUCKY ASSOCIATION OF HEALTH CARE FACILITIES
9403 Mill Brook Road
Louisville, KY 40223
(502) 425-5000

MARK E. REAGAN
HOOPER, LUNDY & BOOKMAN, PC
575 Market Street, Suite 2300
San Francisco, CA 94105
(415) 875-8500

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE LTC PROFESSION HAS LONG USED ARBITRATION AS A MEANS OF OBTAINING DISPUTE RESOLUTION THAT IS BOTH EFFICIENT AND FAIR 5

II. THE PLAIN-STATEMENT RULE ADOPTED BY THE MAJORITY BELOW IS PLAINLY WRONG 8

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

AT&T Techs., Inc. v. Commc'n Workers of Am., 475 U.S. 643 (1986) 11

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 9, 10

Carter v. SSC Odin Operating Co., 976 N.E.2d 344 (Ill. 2012) 6

Cuozzo Speed Techs. v. Lee, 136 S. Ct. 2131 (2016) 10

Dellmuth v. Muth, 491 U.S. 223 (1989) 10

DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) 10

Cases—Continued: Page

Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam) 2, 10

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).....11

Perry v. Thomas, 482 U.S. 483 (1987).....11

Preston v. Ferrer, 552 U.S. 346 (2008).....10

Southland Corp. v. Keating, 465 U.S. 1 (1984).....11

Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) 9

Constitution and Statutes:

U.S. Const. art. VI, cl. 2 (Supremacy Clause).....4, 9

Federal Arbitration Act, 9 U.S.C. §§ 1–16 .....*passim*

9 U.S.C. § 2 3

Other Authorities:

AON Global Risk Consulting, *American Health Care Association Special Study on Arbitration in the Long Term Care Industry* (June 2009) 5

AON Global Risk Consulting, *Long Term Care: General Liability and Professional Liability Actuarial Analysis* (Nov. 2015).....7

Br. *Amicus Curiae* for AHCA in Supp. of Pet'rs, *Clarksburg Nursing & Rehab. Ctr., Inc. v. Marchio*, No. 11-394 (U.S. Oct. 28, 2011), 2011 WL 5189096 2

Other Authorities—Continued: Page

The Federalist No. 44 (James Madison) (George Stade ed., 2006) 9

INTEREST OF *AMICI CURIAE*

The American Health Care Association (AHCA) is the Nation's leading association of long-term care and post-acute care providers, representing the interests of more than 12,000 non-profit and proprietary facilities. AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled Americans who live in skilled nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. AHCA advocates for quality care and services for frail, elderly, and disabled Americans. In order to ensure the availability of such services, AHCA also advocates for the continued vitality of the long-term and post-acute care provider community.*

One way in which AHCA promotes the interests of its members is by participating as an *amicus curiae* in cases before this Court with far-ranging consequences for its members. Such cases include those involving application of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, in response to state judicial rulings inhibiting the use of arbitration to resolve disputes fairly and efficiently. *See, e.g.*, Br. *Amicus Curiae* for AHCA in Supp. of Pet'rs, *Clarksburg Nursing & Rehab. Ctr., Inc. v. Marchio*, No. 11-

---

* No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The petitioners' and respondents' written consents to the filing of this brief have been filed with the Clerk.

394 (U.S. Oct. 28, 2011), 2011 WL 5189096; *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (per curiam) (granting *Clarksburg* petition in curve-lined cases where state court of last resort erroneously held that the FAA does not protect pre-dispute arbitration agreements covering claims of personal injury or wrongful death against a nursing facility, summarily vacating state court's judgment, and remanding for further proceedings).

The Kentucky Association of Health Care Facilities (KAHCF) is a non-profit trade association representing approximately 200 licensed and certified nursing facilities throughout Kentucky. Founded in 1954, KAHCF is the primary advocacy organization for nursing facilities in Kentucky. KAHCF's mission is to promote quality long-term and post-acute care services and supports through advocacy, member services, education, and quality-achievement recognition. KAHCF advocates for its members in legislative, regulatory, and judicial settings to further the overall goals of its membership.

AHCA, KAHCF, and their respective members have a significant interest in the question presented by this case, which is why AHCA and KAHCF previously filed an *amicus* brief supporting the petition for a writ of certiorari filed by Kindred Nursing Centers Limited Partnership, *et al.* (collectively, Kindred). The four-to-three decision of the Supreme Court of Kentucky at issue here held that powers of attorney authorizing attorneys-in-fact to enter into contracts do not include the authority to enter into one particular type of contract: arbitration agreements. Instead, the majority below ruled that in light of the Kentucky Constitution's protection of the right to a

trial by jury, powers of attorney must contain explicit, unambiguous language specifically authorizing the attorney-in-fact to enter into arbitration agreements.

That erroneous decision is emblematic of the struggle members of the long-term and post-acute care profession (collectively, LTC Profession) currently face in seeking judicial enforcement and protection of their federal arbitration rights. The majority decision below also is emblematic of the lengths to which certain state courts will go to impede the exercise of those rights by creating novel legal rules that single out arbitration for special, disfavored treatment in spite of the FAA's command that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

SUMMARY OF ARGUMENT

Kindred's brief explains in detail why the rule adopted by the majority below cannot be reconciled with the FAA or this Court's long line of decisions interpreting the statute's preemptive effect. Rather than repeat those arguments, AHCA and KAHCF wish to emphasize two additional reasons for reversing the judgment of the Supreme Court of Kentucky in this case.

First, the LTC Profession has long used arbitration as a means of obtaining dispute resolution that is both efficient and fair. No profession or industry is perfect. Humans and organizations can, and do, make mistakes. When disputes arise involving the LTC Profession, arbitration permits the parties to appoint subject-matter experts to serve as arbitra-

tors who can quickly resolve the issues such disputes often entail, including questions regarding the scope of professional duties of care, whether such duties were breached, and whether such a breach caused the injury complained of. Many members of the LTC Profession use arbitration agreements containing elements similar to the agreements at issue here, which grant the resident or resident representative a significant period of time to rescind the agreement and provide that the facility will incur most, and sometimes all, of the costs of arbitration. And as demonstrated by one recent study, such claimants often recover significant amounts, with the highest proportion of recoveries falling in the $25,000 to $250,000 range.

Second, the plain-statement rule adopted by the majority below is plainly wrong. It not only ignores the fact that the Supremacy Clause of the United States Constitution requires a state constitutional provision to give way to contrary federal law, the majority's plain-statement rule is the opposite of what the rule must be under the FAA. In light of the emphatic federal policy in favor of arbitral dispute resolution, a power of attorney that authorizes an attorney-in-fact to enter into contracts must unambiguously *exclude* the authority to enter into arbitration agreements before such an instrument can be held not to convey such authority in a case subject to the FAA. That rule, which is consistent with the plain-statement rule adopted by this Court in the context of interpreting contract language controlling the scope of disputes subject to arbitration, puts arbitration agreements on equal footing with all other contracts as Congress intended.

Accordingly, the judgment of the Supreme Court of Kentucky should be reversed.

ARGUMENT

I. THE LTC PROFESSION HAS LONG USED ARBITRATION AS A MEANS OF OBTAINING DISPUTE RESOLUTION THAT IS BOTH EFFICIENT AND FAIR

A significant percentage of individuals who require care by the LTC Profession are incapable of contracting for themselves, whether because of such things as accidental injury or disability resulting from the normal aging process. Many individuals have planned for such an eventuality by preparing general powers of attorney that give designated individuals whom they trust authority to, among other things, enter into contracts on their behalf. The LTC Profession, in turn, depends on such powers of attorney to deliver timely care and to order its business affairs on a daily basis.

Arbitration agreements are a common and essential component of contracting in the LTC Profession. Like many industry sectors, the LTC Profession has long used arbitration agreements as a means of facilitating timely and efficient dispute resolution. *See, e.g.*, AON Global Risk Consulting, *American Health Care Association Special Study on Arbitration in the Long Term Care Industry* 5 (June 2009) (describing history of LTC Profession's use of arbitration agreements and benefits of same), *available at* https://www.ahcancal.org (last visited Dec. 11, 2016). The two arbitration agreements at issue here even share certain attributes of the model arbitration agreement AHCA makes available to its members nationwide. For example, in addition to not being a condition of admission to the nursing facility, each

arbitration agreement is a document separate from the admission agreement and grants the resident or resident representative 30 days to rescind the arbitration agreement. J.A. 19, 26. Like the arbitration agreements at issue here, it also is common for arbitration agreements in the LTC Profession to provide that the facility will pay all or most of the costs of arbitration, including the arbitrators' fees. *See* J.A. 17, 24 (provisions in arbitration agreements at issue here providing that the facility will pay all such fees up to five days of hearing, with subsequent fees being divided equally between the parties); *see also, e.g.*, *Carter v. SSC Odin Operating Co.*, 976 N.E.2d 344, 349 (Ill. 2012) (describing arbitration agreement providing that nursing facility would pay all arbitration fees).

Moreover, disputes involving the LTC Profession are particularly well-suited for resolution using arbitration. When such disputes arise involving residents or their representatives, they most often sound in tort and involve an alleged breach of the professional standard of care. Many such cases are limited in temporal scope and focus on relatively modest factual disputes, as well as disagreements in expert testimony regarding the scope of the professional duty in question, whether it was breached, and whether any such breach proximately caused the injury complained of. The parties often are able to appoint arbitrators who have specialized expertise in resolving such disputes, including former judges.

Arbitration also provides a better mode of dispute resolution for the typical claimant than traditional court-based litigation. For example, a recent study performed by a leading provider of risk-management

and insurance services found that claims involving the LTC Profession that are subject to arbitration resolve three months faster on average than claims not subject to arbitration. AON Global Risk Consulting, *Long Term Care: General Liability and Professional Liability Actuarial Analysis* 10 (Nov. 2015), *available at* https://www.ahcancal.org (last visited Dec. 11, 2016). In addition, the same study found that such claimants can, and often do, recover significant amounts. As demonstrated by the following table reproduced from the study, almost 50 percent of claims subject to arbitration resulted in recoveries falling in the $25,000 to $250,000 range:

Indemnity Amount	Arbitration		Non-Arbitration	
No Payment	**233**	**27.5%**	**267**	**20.2%**
$25,000 to $250,000	**407**	**48.0%**	**541**	**41.0%**
Greater than $1,000,000	**7**	**0.8%**	**25**	**1.9%**
Claims with Payment	**615**	**72.5%**	**1,053**	**79.8%**

Id. at 11. Accordingly, the contention made by some anti-arbitration advocates that arbitration involving the LTC Profession is somehow categorically unfair to claimants has no basis in fact.

II. The Plain-Statement Rule Adopted by the Majority Below Is Plainly Wrong

The narrow majority of the Supreme Court of Kentucky held that, before Kentucky's courts will enforce an arbitration agreement entered into by an attorney-in-fact pursuant to a power of attorney, the power of attorney must contain an explicit, unambiguous statement specifically authorizing the attorney-in-fact to enter into arbitration agreements. Pet. App. 41a. Language vesting an attorney-in-fact with authority to enter into contracts is insufficient. *Id.* at 42a. The majority crafted its novel legal rule because the "drafters of [Kentucky's] Constitution deemed the right to a jury trial to be *inviolate*, a right that cannot be taken away; and, indeed, a right that is *sacred*, thus denoting that right and that right alone as a divine God-given right." *Id.* at 43a.

As Kindred's brief explains in detail (at 12–29), the rule adopted by the majority below cannot be reconciled with the FAA or this Court's jurisprudence interpreting the statute's preemptive force. At a more fundamental level, however, the "constitutional right" line of reasoning used by the majority below ignores the fact that the foundation for this Court's preemption jurisprudence—the Supremacy Clause of the United States Constitution—applies even if the contrary state rule is embodied in a state constitution.

In relevant part, the Supremacy Clause provides that the "Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution* or Laws *of any State to the Contrary notwithstanding*." U.S. Const. art. VI, cl. 2 (emphasis

added). From the earliest days of our Nation, the Supremacy Clause has been understood to require that a state constitutional provision must give way to a contrary federal law. *See, e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236–37 (1796) (opinion of Chase, J.) ("If the Constitution of a State (which is the fundamental law of the State, and paramount to its Legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the State Legislature, must not be prostrate?"). A contrary rule would create a "monster, in which the head was under the direction of the members." *The Federalist No. 44*, at 254 (James Madison) (George Stade ed., 2006).

In those instances in which this Court has adopted a plain-statement rule similar to that adopted by the majority below, it has done so in recognition of the fact that a default legal principle of great significance requires the use of express, unambiguous language if that default principle is to be overcome. For example, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Court was asked to decide whether Congress had granted a federal agency authority to promulgate rules with retroactive effect. In finding that Congress had not granted the agency such authority, the Court explained:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to

> promulgate retroactive rules unless that power is conveyed by Congress in express terms.

Id. at 208.[†]

The default legal principle of great significance that controls here is not the Kentucky Constitution's language regarding the right to a jury trial. Instead, the default legal principle that controls is that arbitration is *favored* as a matter of federal law. As this Court has held time and again, the FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution. The [FAA] supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008); *see also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (explaining that "due regard" must be given to the "federal policy favoring arbitration") (internal quotation marks and citation omitted); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam) (explaining that the FAA

[†] Other examples of this Court's use of plain-statement rules or their near equivalents have involved similar instances of needing to overcome a default legal principle of great significance. *See, e.g., Cuozzo Speed Techs. v. Lee*, 136 S. Ct. 2131, 2140 (2016) (explaining that the "strong presumption in favor of judicial review" of agency action must be overcome by "clear and convincing indications") (internal quotation marks and citation omitted); *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.") (internal quotation marks and citation omitted).

"reflects an emphatic federal policy in favor of arbitral dispute resolution") (internal quotation marks and citation omitted); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (explaining that the FAA "embodies a clear federal policy" in favor of arbitration); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (explaining that by enacting the FAA, "Congress declared a national policy favoring arbitration").

This Court has previously applied what amounts to a plain-statement rule that promotes arbitration in recognition of the fact that arbitration is favored as a matter of federal law. For example, the Court has explained that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, *whether the problem at hand is the construction of the contract language itself* or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (emphasis added); *see also AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 650 (1986) (explaining that an order compelling arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"). The Court should adopt a similar plain-statement rule here that is the converse of the rule adopted by the majority below, such that a power of attorney authorizing an attorney-in-fact to enter into contracts on behalf of the principal must unambiguously *exclude* the authority to enter into arbitration agreements before such an instrument will be held not to convey such authority in a case subject to the FAA.

CONCLUSION

For the foregoing reasons and those contained in Kindred's brief, the judgment of the Supreme Court of Kentucky should be reversed.

Respectfully submitted.

JAMES F. SEGROVES
Counsel of Record
KELLY A. CARROLL
DAVID J. VERNON
HOOPER, LUNDY & BOOKMAN, PC
401 Ninth Street, NW, Suite 550
Washington, DC 20004
(202) 580-7700
jsegroves@health-law.com

ELIZABETH A. JOHNSON
KENTUCKY ASSOCIATION OF HEALTH CARE FACILITIES
9403 Mill Brook Road
Louisville, KY 40223
(502) 425-5000

MARK E. REAGAN
HOOPER, LUNDY & BOOKMAN, PC
575 Market Street, Suite 2300
San Francisco, CA 94105
(415) 875-8500

DECEMBER 2016

BOOKS AND BRIEFS

In The

Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, et al.,

Petitioners,

v.

JANIS E. CLARK, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF OF ARBITRATION SCHOLAR IMRE S. SZALAI AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

IMRE S. SZALAI
Judge John D. Wessel Distinguished
Professor of Social Justice
Counsel of Record
LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW
7214 St. Charles Avenue, Box 901
New Orleans, LA 70118
(504) 861-5589
iszalai@loyno.edu

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The FAA's Text, Legislative History, And The Historical Background Of The FAA's Enactment Demonstrate That The FAA Does Not Govern Personal-Injury Claims 4

II. The Court Should Also Affirm The Decision Below Because Applying The FAA In This Case Results In An Unconstitutional Intrusion On State Sovereignty 11

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 12, 15, 16, 21

Arnold v. Burger King, 48 N.E.3d 69 (Ohio Ct. App. 2015) 2, 8, 9

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) 3, 5, 10

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) 11, 15, 20

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 23

Figueroa v. THI of New Mexico, 306 P.3d 480 (N.M. Ct. App. 2012) 22

Galeana Telecomm. Invs., Inc. v. Amerifone Corp., 2016 WL 4205997 (E.D. Mich. Aug. 10, 2016) 7

Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931) 4, 17

Johnson v. Fankell, 520 U.S. 911 (1997) 3, 17, 19

Johnson v. Rent-A-Center, 2014 Mo. App. LEXIS 1227 (Mo. Ct. App. Nov. 4, 2014) 8, 9

Johnson v. Rent-A-Center, 2014 Mo. App. LEXIS 1385 (Mo. Ct. App. Dec. 9, 2014) 9

Jones v. Halliburton Co., 583 F.3d 228 (5th Cir. 2009) 8, 9

Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201 (2012) 4, 5, 7

TABLE OF AUTHORITIES – Continued

Page

Marsh Farms v. Olvey, 974 So. 2d 194 (La. Ct. App. 2008).....22

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).....*passim*

Osei v. Univ. of Maryland Univ. Coll., 2016 WL 4269100 (D. Md. Aug. 15, 2016).....7

Peters v. Pillsbury Winthrop Shaw Pitman, LLP, 2011 WL 5304627 (Conn. Super. Ct. Oct. 17, 2011).....22

Preston v. Ferrer, 552 U.S. 346 (2008).....*passim*

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).....20

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).....11

Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935).....4

Southland Corp. v. Keating, 465 U.S. 1 (1984).....*passim*

THI of New Mexico v. Patton, 741 F.3d 1162 (10th Cir. 2014).....22

Uhl v. Komatsu Forklift Co., 512 F.3d 294 (6th Cir. 2008).....22

United States v. Lopez, 514 U.S. 549 (1995).....19

Wilko v. Swan, 346 U.S. 427 (1953).....20, 21

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Federal Arbitration Act, 9 U.S.C. §§ 1-16 ..... *passim*

28 U.S.C. § 1404 18

LEGISLATIVE MATERIALS

Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. (1924) 9, 10

H.R. Rep. No. 68-96 (1924) 15

OTHER AUTHORITIES

Lia Iannetti, *New Rule on Accelerated Adjudication Procedures in New York State Courts* (May 2014), https://www.cpradr.org/news-publications/articles/2014-05-23-new-rule-on-accelerated-adjudication-procedures-in-new-york-state-courts 20

Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* (1992) 13, 15

Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013, 2013 O.J. (L 165) 1 19

TABLE OF AUTHORITIES – Continued

Page

Peter B. Rutledge, *Arbitration and the Constitution* (2013) 19

Imre S. Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013) 2, 10

Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. Cal. L. Rev. 103 (2015) 18

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Imre S. Szalai is the Judge John D. Wessel Distinguished Professor of Social Justice at Loyola University New Orleans College of Law. He is a graduate of Yale University, and he received his law degree from Columbia University, where he was named a Harlan Fiske Stone Scholar. His teaching and scholarly passion focus on dispute resolution, arbitration, and arbitration law. For more than a decade, he has extensively studied the uses of arbitration and the development of arbitration law in America from the colonial period to the present. His scholarship has appeared in the top journals of dispute resolution, and he maintains a blog focusing on arbitration law. He has provided written testimony to Congress regarding arbitration law developments, and he has appeared in national media, such as Forbes and public radio, in connection with stories about arbitration. As a leading scholar in this field, he is regularly invited to speak at conferences and symposia about the evolution of arbitration law. Based on his extensive research of previously-untapped archival materials from the drafters of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, he wrote a comprehensive, leading book exploring the

---

[1] *Amicus* files this brief in his individual capacity, not as a representative of the institution with which he is affiliated. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus* through his professorship funds, made a monetary contribution to the preparation or submission of this brief. All parties have provided written consent to the filing of this brief, and their written consent has been filed with the Clerk.

development and enactment of the FAA and similar state statutes during the 1920s, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013). He also serves as a commercial arbitrator for the Financial Industry Regulatory Authority (FINRA). He has dedicated his professional life to the study and use of arbitration as an effective way to resolve disputes.

This case involves fundamental questions about the meaning and scope of the FAA. *Amicus* is concerned about the proper development of arbitration law, and he submits this brief to assist the Court in considering issues not addressed by Petitioners or their *amici*.

SUMMARY OF ARGUMENT

The text of the FAA, its legislative history, and the historical background of the FAA's enactment all demonstrate that the FAA was never intended to govern personal-injury claims. *Amicus* respectfully requests that the Court adopt a narrow, pragmatic exclusion from the FAA's coverage for personal-injury claims that can be asserted without reference to a contract. *See, e.g.*, *Arnold v. Burger King*, 48 N.E.3d 69, 77 (Ohio Ct. App. 2015) (employee's tort claims arising from her rape by a supervisor during work hours cannot be subject to arbitration where such tort claims "may be asserted independently, without reference to the contract" (citation omitted)).

Petitioners' core argument in favor of reversal focuses exclusively on the FAA's preemption of state law pursuant to *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). However, this case should not be framed or analyzed as a preemption case. Instead, this case involves a fundamental issue of the FAA's threshold coverage, and Petitioners' preemption argument overlooks the FAA's unambiguous text. As explained below, critical but often overlooked language in the FAA creates an exception for personal-injury claims that can be asserted without reference to a contract. The FAA was enacted to facilitate the arbitration of commercial disputes, not tort claims involving abuse and physical harms. Petitioners' flawed preemption argument cannot overcome the clarity of the FAA's text, legislative history, and the historical background of the FAA's enactment, all of which establish that the FAA does not cover personal-injury claims. As a result, the Court should affirm the decision below.

Furthermore, the Court should affirm the decision below because applying the FAA in this case results in an unconstitutional intrusion on state sovereignty. If the Court enforces Petitioners' arbitration clauses, such enforcement would strip away the sovereignty of a state to design and implement its own policies to protect personal-injury victims. *Johnson v. Fankell*, 520 U.S. 911, 922 & n.13 (1997) ("[R]espect [for federalism] is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts," and it is "quite clear that it is a matter for each State to

decide how to structure its judicial system." (citations omitted)); *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) ("[T]he procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.").[2]

ARGUMENT

I. The FAA's Text, Legislative History, And The Historical Background Of The FAA's Enactment Demonstrate That The FAA Does Not Govern Personal-Injury Claims

Since the enactment of the FAA in 1925, the Court has issued nearly sixty opinions discussing or applying the FAA. From this entire body of cases spanning almost a century, it was not until 2012 that the Court briefly discussed, for the first time, whether the FAA applies to personal-injury cases.[3] *See Marmet Health*

[2] This case does not involve the interpretation of an arbitration clause, or whether an existing agreement to arbitrate should be revoked. As demonstrated in the Respondents' brief, no contract was formed under Kentucky law. However, to the extent the Court is inclined to find an agreement exists under the FAA, *amicus* argues the FAA does not govern this case for the several reasons set forth in this brief.

[3] An old FAA case, *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935), involved personal injury. However, the Court's decision focused solely on the appealability of orders compelling arbitration and did not discuss the threshold issue of whether the FAA governs personal-injury claims. Furthermore, although personal injuries were involved in *Schoenamsgruber*, the asserted claims were contractual in nature. *Id.* at 455 ("The libels assert that the wrongful act constituted a breach of

Care Center, Inc. v. Brown, 132 S. Ct. 1201 (2012). In *Marmet*, the families of three patients filed personal-injury or wrongful-death actions against nursing homes. The state court in *Marmet* held that as a matter of state public policy, arbitration clauses in nursing home agreements are not enforceable in connection with personal-injury or wrongful-death claims. In a brief *per curiam* opinion, the Court in *Marmet* relied on the preemption doctrine set forth in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and summarily concluded that the FAA preempts a state's categorical rule prohibiting arbitration of particular claims. *Marmet*, 132 S. Ct. at 1203-04.

The Court in *Marmet* conducted only a cursory analysis of the FAA's text when discussing whether personal-injury claims can be arbitrated under the FAA. After quoting § 2 of the FAA, the heart of the statute, the Court succinctly stated that "[t]he statute's text includes no exception for personal-injury or wrongful-death claims." *Id.* at 1203. Although the FAA's text does not explicitly mention personal-injury or wrongful-death claims, a closer analysis of the FAA's text demonstrates the FAA was never intended to govern such claims. As explained below, § 2 of the FAA contains a significant, qualifying limitation overlooked by the Court in *Marmet*.

The relevant part of § 2, the core provision of the FAA, states the following:

---

respondents' contract to carry the child safely from Hamburg, Germany, to San Francisco.").

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. To paraphrase § 2, the FAA governs written arbitration provisions either in a maritime transaction or in a contract involving interstate commerce, and such arbitration provisions are binding with respect to certain defined controversies. More specifically, there are two types of controversies covered by this language of the FAA:

> (1) controversies arising out of a contract involving interstate commerce; and
>
> (2) controversies arising out of a maritime transaction.[4]

Thus, the text of the FAA unequivocally sets forth important, qualifying limitations to the FAA's coverage. The FAA's coverage is limited to written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract." [hereinafter

---

[4] The FAA defines the phrase "maritime transaction" as covering different categories of maritime contracts: "charter parties"; "bills of lading of water carriers"; and "agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." This case, of course, does not involve a maritime transaction.

Contract Limitation of § 2]. The Court in *Marmet* did not address this critical Contract Limitation of § 2.

It is axiomatic that tort liability may exist independent of a contract. *See, e.g., Osei v. Univ. of Maryland Univ. Coll.*, 2016 WL 4269100, at *10 (D. Md. Aug. 15, 2016) (citing the classic elements of a negligence claim – duty, breach, causation, and damages – and explaining that "the duty giving rise to a tort action must have some independent basis [from a contractual obligation]" (citation omitted)); *see also Galeana Telecomm. Invs., Inc. v. Amerifone Corp.*, 2016 WL 4205997, at *7 (E.D. Mich. Aug. 10, 2016) ("an action in tort requires a breach of duty separate and distinct from a breach of contract" (citations omitted)). For example, one's right to be free from bodily harm in a car accident does not depend on or arise from any contract.

If a tort does not arise from a contract, then it is impossible for the FAA to cover such a tort claim because of the FAA's explicit Contract Limitation set forth in § 2. Consider a hypothetical situation in which an octogenarian resident of a nursing home is beaten by a staff member and files a tort suit, and a few days later, a visitor is also assaulted by the same staff member and files a tort suit. In both cases, the right to sue for bodily harm arises independently from a contract. Because their claims for personal injury can be stated without any reference to a contract, it is impossible for their claims to arise from a contract. As a result, their claims are not governed by the FAA due to the FAA's Contract Limitation, which the Court did not take into consideration in *Marmet*.

Amicus respectfully requests that, based on the Contract Limitation in § 2, the Court adopt a narrow, reasonable exclusion from the FAA's coverage for personal-injury claims that can be asserted without reference to a contract. Lower courts are, in effect, already applying the proposed exclusion by holding that tort claims should not be arbitrated. For example, in *Arnold v. Burger King*, a plaintiff employee alleged that her supervisor raped her in the bathroom of Burger King during work hours. 48 N.E.3d 69 (Ohio Ct. App. 2015). The plaintiff had signed a mandatory arbitration clause as part of her employment, and the defendants tried to dismiss the plaintiff's tort claims from court by asking the court to enforce the arbitration agreement. *Id.* at 72. The Ohio appellate court in *Burger King* held that the employee's tort claims arising from the rape could not be arbitrated on the grounds that such tort claims "may be asserted independently, without reference to the contract." *Id.* at 77 (citation omitted). *See also Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009) (tort claims arising from alleged gang-rape are not arbitrable); *but see id.* at 242-43 (dissenting opinion) (tort claims arising from alleged gang-rape are arbitrable because these claims were related to the plaintiff's employment).

In *Johnson v. Rent-A-Center*, a Missouri appellate court compelled arbitration in a case involving an elderly man who had rented a television and refrigerator from Rent-A-Center and was later robbed and beaten to death by Rent-A-Center's repairman. 2014 Mo. App. LEXIS 1227 (Mo. Ct. App. Nov. 4, 2014). Although the

trial court properly refused to compel arbitration because the victim's claims did not require reference to the rental agreement containing the arbitration clause, the Missouri appellate court reversed and enforced the arbitration agreement. *Id.* at *4, *1. Fortunately, about one month later, the Missouri appellate court withdrew its erroneous opinion compelling arbitration. *Johnson v. Rent-A-Center*, 2014 Mo. App. LEXIS 1385 (Mo. Ct. App. Dec. 9, 2014). The trial court was correct in its initial decision not to enforce the arbitration clause in the decedent's rental agreement.

This *Rent-A-Center* wrongful death case, *Burger King* rape case, *Halliburton* gang-rape case, as well as the present case involving nursing home abuse and wrongful death, all demonstrate grounds for this Court to recognize a narrow exclusion from the FAA, based on the explicit Contract Limitation in § 2, for personal-injury claims that can be asserted without reference to a contract. As a statute designed for the resolution of commercial disputes, the FAA was never intended to cover such personal-injury claims. The FAA's text explicitly supports such an exclusion.

The legislative history and historical background of the FAA's enactment confirm that the FAA was designed for the arbitration of commercial disputes, not personal-injury claims. Testimony from the FAA's drafters and supporters demonstrates that the legislation was designed for "ordinary, everyday trade disputes," rather than personal-injury claims. *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out*

of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 7 (1924) (the FAA covers "ordinary, everyday trade disputes," and "it is for them that this legislation is proposed"); *id.* (FAA covers commercial disputes arising in interstate commerce, such as a "farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey"); *id.* at 30-31 (arbitration reduces "business litigation" and encourages "business men" to settle their "business differences"); *id.* at 31 (adoption of the FAA is necessary to facilitate the resolution of disputes "arising in [merchants'] daily business transactions"). As evidenced above, the FAA was developed for business interests desiring a quick, efficient way to resolve "everyday trade disputes" and "business differences" arising from the interstate shipment of goods in the growing national economy of the early 1900s, not personal-injury claims. *See generally* Imre S. Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013).

Petitioners' sole argument in favor of reversal is based on the FAA's preemption of state law. However, this case should not be framed or analyzed as one involving the preemption of state law under *Concepcion*. Instead, this case involves a threshold question of the FAA's coverage and the often overlooked, yet explicit, Contract Limitation of § 2 of the FAA, which this Court ought not and constitutionally cannot alter. The FAA's text, legislative history, and historical background

overwhelmingly support the recognition of a narrow, reasonable exception to the FAA for personal-injury claims that can be asserted without reference to a contract. Relying solely on the explicit limitations of the FAA, defined by the text of the statute, the Court should affirm the decision below.

II. The Court Should Also Affirm The Decision Below Because Applying The FAA In This Case Results In An Unconstitutional Intrusion On State Sovereignty

In a series of FAA cases spanning the last several decades, the Court has repeatedly confirmed that the enforcement of arbitration agreements is purely procedural. For example, the Court has explained that by agreeing to arbitrate, "a party does not forgo the substantive rights afforded by [a statute]; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). In several cases, the Court has conceptualized the enforcement of arbitration agreements as nothing more than a procedural tool to define or determine substantive rights. *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) ("[an arbitration] agreement *only* determines the choice of forum" (emphasis added)); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."). In *Preston v.*

Ferrer, 552 U.S. 346 (2008), the Court highlighted the procedural nature of arbitration and emphasized that arbitration does not impact substantive rights: "[The enforceability of an arbitration agreement] presents *precisely* and *only* a question concerning the forum in which the parties' dispute will be heard. . . . So here, [the plaintiff, who must arbitrate,] relinquishes no substantive rights the [California Talent Agencies Act] or other California law may accord him." *Id.* at 359 (emphasis added and citation omitted). As explained by the Court in *Mitsubishi Motors*, when parties agree to arbitrate, the parties are merely "trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 473 U.S. at 628. The enforcement of an arbitration agreement is procedural because an arbitration agreement does not set forth any rules of decision; instead, an arbitration agreement simply identifies the method and forum for resolving substantive disputes. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 289 (1995) (Thomas, J., dissenting, joined by Scalia, J.) ("An arbitration agreement is a species of forum-selection clause: Without laying down any rules of decision, it identifies the adjudicator of disputes."). In sum, the Court in several cases has declared that the enforcement of an arbitration agreement is fundamentally a matter of pure procedure.

Unfortunately, the Court has injected significant discord into arbitration law through its decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). In *Southland*, the Court held that the enforcement of

arbitration agreements under the FAA should be treated as "a *substantive* rule applicable in state as well as federal courts." *Id.* at 16 (emphasis added). *Southland* is considered one of the most deeply flawed Supreme Court decisions ever issued regarding federalism, due to the broad, unconstitutional intrusion on state sovereignty arising from *Southland*. As thoroughly proven by the late Professor Ian Macneil in his groundbreaking book regarding the FAA, and consistent with the procedural conceptualization of arbitration in several cases like *Mitsubishi Motors* and *Preston*, Congress intended the FAA to be a procedural statute applicable solely in the federal courts, not the state courts. *See generally* Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* (1992).

In addition to the serious constitutional concerns arising from *Southland*, *Southland* is also wrongly decided as a matter of statutory construction. The FAA is a fully-integrated, unitary statute designed to facilitate the different stages of arbitration – the commencement of an arbitration proceeding, the proceeding itself, and the end of the proceeding. For example, the FAA contains provisions governing the enforcement of an arbitration clause to commence an arbitration proceeding, 9 U.S.C. §§ 3-4; provisions governing subpoena powers to compel attendance of arbitral witnesses for the middle of an ongoing proceeding, 9 U.S.C. § 7; and judicial confirmation and vacatur provisions for the end of an arbitration proceeding, 9 U.S.C. §§ 9-10. When one properly examines the entire statute as a

comprehensive framework designed to facilitate commercial arbitration, one readily sees that the FAA is a statute applicable solely in federal courts because the FAA is filled with constant and exclusive references to the federal courts. For example, § 4 provides procedures for judicial enforcement of an arbitration clause in order to commence an arbitration proceeding. 9 U.S.C. § 4. More specifically, § 4 refers exclusively to the powers of a "United States district court" to enforce an arbitration clause, and § 4 expressly incorporates the Federal Rules of Civil Procedure. *Id.* If the FAA, as a comprehensive arbitration statute, were truly intended to apply in state courts as *Southland* incorrectly held, § 4 of the FAA would not refer exclusively to federal courts and the Federal Rules of Civil Procedure. Similarly, for the middle of an arbitration proceeding, if a party needs assistance to compel the attendance of witnesses at the arbitration hearing, the FAA provides for a petition to the "United States district court" in whose district the arbitrators are sitting. 9 U.S.C. § 7. Again, if the comprehensive statute were intended to apply in state courts, the statute would not refer exclusively to federal courts. Likewise, at the back-end of an arbitration proceeding, if a party wants to seek judicial vacatur of an arbitral award, § 10 permits a party to file an application for vacatur in the "United States court in and for the district wherein the award was made." 9 U.S.C. § 10. The comprehensive, fully-integrated nature of the FAA and the FAA's explicit and exclusive references to federal courts and the Federal Rules of Civil Procedure make clear, as a textual matter, that the FAA was not intended to be a

substantive law applicable in state courts. *See* Macneil, *supra*, at 105-07.[5]

Furthermore, historical understandings of arbitration help confirm the flaws of *Southland*. Consistent with the Court's modern treatment of arbitration as a procedural vehicle for enforcing substantive rights in several cases like *Preston*, *Waffle House*, and *Mitsubishi Motors*, the governing, universal understanding of arbitration law when the FAA was enacted in 1925 was that arbitration law is procedural law. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286-89 (1995) (Thomas, J., dissenting, joined by Scalia, J.). *See also* H.R. Rep. No. 68-96, at 1 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law

---

[5] The *Southland* majority did not evaluate the FAA within its proper context as an integrated, complete framework supporting the different stages of arbitration. Instead, to support its flawed result that the FAA applies in state court, the *Southland* majority selectively plucked out and focused solely on language from § 2 of the FAA, which generally provides that an arbitration agreement is binding. By focusing solely on this isolated language from § 2 and ignoring the fully-integrated nature of the statute, the *Southland* majority concluded that the selected language contained no restrictions limiting the FAA to federal courts. *Southland*, 465 U.S. at 10-11 (finding "only two limitations" in the language of § 2 of the FAA, namely, a written contract involving interstate commerce and issues of revocability under contract law). As a result of this narrow observation focusing solely on one part of the broader statute, the Court saw no limits regarding state courts and easily reached the erroneous conclusion that the FAA therefore applies in state courts. *Id.* at 16. However, as explained above, the FAA's explicit and exclusive references to federal courts and the Federal Rules of Civil Procedure demonstrate that the statute applies only in federal court.

court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential.").

As a result of the deeply problematic *Southland* ruling, there is an ongoing, unconstitutional, "permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting). To illustrate this unconstitutional displacement of state law, consider the result and ramifications of *Preston v. Ferrer*, where the Court relied on the FAA, a purely procedural federal statute, to override state sovereignty in connection with proceedings in both state court and a state administrative agency charged with the enforcement of state-created rights. 552 U.S. 346 (2008). In *Preston*, the California legislature had designed an administrative tribunal, with its own expertise and unique procedures, to handle a special type of dispute under California law regarding talent agents in California's entertainment industry. *Id.* at 354-56. Under California law, this carefully-designed tribunal had exclusive jurisdiction to resolve these state-law disputes. *Id.* at 356. The Court in *Preston* held that "the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 359. *Preston*'s holding is tenuous because states have sovereign authority to control the procedures by which state-created rights are enforced, and federal attempts to control such

procedures raise serious federalism concerns. As recognized by this Court, "the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control," and states have broad, exclusive powers to adopt any procedure for the enforcement of rights, as long as the procedure "satisfies the constitutional requirements of reasonable notice and opportunity to be heard." *Hardware Dealers' Mut. Fire Ins. Co v. Glidden Co.*, 284 U.S. 151, 158 (1931).

As a result of *Southland*'s unconstitutional holding, states can no longer design and require specialized administrative tribunals to implement fundamental policies that are traditionally within the sphere of state authority, as illustrated by the severe displacement of state law in *Preston*. If the FAA controls the present case, which arises from the Kentucky state court system and involves state-created rights, the FAA would interfere with and displace the sovereignty of a state to design, implement, and enforce its own particular policies regarding tort law, consumer protection law, agency law, and the delivery of healthcare services to its elderly citizens. As a result of the Court's erroneous decision in *Southland*, the Court is stripping away the power of a state to enforce its own state-created substantive rights, and such an intrusion on state sovereignty is diametrically opposed to principles of federalism. "[R]espect [for federalism] is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts." *Johnson v.*

Fankell, 520 U.S. 911, 922 (1997); *see also* Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. Cal. L. Rev. 103 (2015) (FAA's preemptive impact on state administrative and regulatory schemes violates constitutional guarantees of federalism).

Consider the following hypothetical involving the federal transfer statute, 28 U.S.C. § 1404, which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." The federal transfer statute is a procedural statute, intended to apply solely to transfers within the federal court system. Suppose that just like the *Southland* majority, the Court ignores the references to federal district courts and expansively misconstrues the federal transfer statute to say that "for the convenience of parties and witnesses, in the interest of justice, a . . . court may transfer any civil action to any other [court]." By ignoring the explicit reference to federal district courts and turning a blind eye to constitutional concerns, one could easily conclude that the federal transfer statute is applicable in state courts. As a result of this erroneous interpretation, a California state court could be forced to accept the transfer of a case from a New York state court "for the convenience of the parties and witnesses." Such an interpretation of the federal transfer statute as a procedural statute binding on the states would raise serious federalism concerns because

the Court "ha[s] made it quite clear that it is a matter for each State to decide how to structure its judicial system." *Johnson v. Fankell*, 520 U.S. 911, 922 n.13 (1997). The Court's ruling in *Southland*, which interpreted the FAA to govern in state courts, is just as statutorily and constitutionally flawed as this hypothetical interpretation of the federal transfer statute.

Instead of permitting federal law to unconstitutionally trump the sovereignty of states, this Court as guardian of our system of federalism must preserve the critical role of the states as "laboratories for experimentation." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring, joined by O'Connor, J.) (citation omitted). Giving each state the freedom to experiment with the development of its own arbitration laws would help promote the values of federalism and spur innovation among the states to regulate arbitration in different, creative ways. Peter B. Rutledge, *Arbitration and the Constitution* 121 (2013) (sacrificing the uniformity values of *Southland* would promote federalism values in connection with dispute resolution). For example, the European Union has developed an online dispute resolution platform for the resolution of consumer disputes arising from e-commerce sales, and consumers must affirmatively consent to such proceedings. *See* Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013, 2013 O.J. (L 165) 1. This development in the European Union has the potential to increase the efficiency of dispute resolution, promote e-commerce, reduce judicial workloads, and protect the interests of both consumers

and businesses in a fair manner where the consumer provides meaningful consent. If states were not restrained by the unconstitutional holding of *Southland*, states could innovate by developing similar, creative solutions for resolving disputes through arbitration. Furthermore, vibrant and diverse systems of arbitration could in turn spur innovations in judicial procedures and improve the administration of justice. The New York judiciary, for example, recently updated its procedures for resolving commercial disputes in order to make New York courts more competitive with arbitration. *See* Lia Iannetti, *New Rule on Accelerated Adjudication Procedures in New York State Courts* (May 2014), https://www.cpradr.org/news-publications/articles/2014-05-23-new-rule-on-accelerated-adjudication-procedures-in-new-york-state-courts. *Southland*'s erroneous holding undermines important values of federalism and cripples the ability of states to innovate and develop alternative methods of dispute resolution.

Southland's holding that the FAA is substantive law is strongly refuted by the Court's fundamental conceptualization of arbitration as procedural in several cases such as *Waffle House* and *Mitsubishi Motors*. Interestingly, the Court's view of arbitration as a neutral procedure represents a whiplashing, 180-degree reversal of the Court's earlier FAA jurisprudence. *Compare Wilko v. Swan*, 346 U.S. 427 (1953) (arbitration undermines the effective application of substantive laws), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), *with*

Mitsubishi Motors, 473 U.S. at 628 (by agreeing to arbitrate, "a party does not forgo the substantive rights afforded by [a statute]; it only submits to their resolution in an arbitral, rather than a judicial, forum."). In the overruled *Wilko* decision, the Court viewed arbitration as impacting substantive rights, which is an erroneous, outdated view of arbitration. *Southland*'s treatment of the FAA as substantive law appears to be a vestige of this outdated, overruled misunderstanding of arbitration from *Wilko*, which misconstrued arbitration as impacting substantive rights. *Stare decisis* did not prevent this Court from dramatically changing its outdated view of the FAA in *Wilko* and re-conceptualizing arbitration as purely procedural. Similarly, *stare decisis* should not prevent the Court from overruling its unconstitutional holding in *Southland* that the enforcement of an arbitration clause is substantive law binding on the states.

Justice O'Connor, a dissenter in *Southland*, mentioned a desire to protect commercial expectations as a reason for keeping the flawed *Southland* decision alive under *stare decisis*. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283-84 (1995) (O'Connor, J., concurring). However, *stare decisis* is not a valid reason to retain the unconstitutional *Southland* decision. First, as explained above, *stare decisis* did not stop the Court from radically reinterpreting the FAA when overruling *Wilko v. Swan*. Second, to the extent the Court is concerned about interfering with commercial expectations by overruling *Southland*, such a concern is overstated.

Many states will continue to enforce arbitration agreements as they have arbitration laws patterned after the FAA. *See, e.g.*, *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 303 (6th Cir. 2008) ("Michigan's arbitration law is almost identical to the FAA in all relevant respects."); *Peters v. Pillsbury Winthrop Shaw Pitman, LLP*, 2011 WL 5304627, at *1 (Conn. Super. Ct. Oct. 17, 2011) ("federal and Connecticut state law on arbitration are similarly in concert"); *Marsh Farms v. Olvey*, 974 So. 2d 194, 196 (La. Ct. App. 2008) ("Louisiana courts look to federal law in interpreting the [state arbitration] act because it is virtually identical to the Federal Arbitration Act."). And if a state determines that arbitration agreements should not be enforceable, such is the nature of our system of federalism. Because the FAA is a procedural statute applicable solely in federal court, each state should have the right to decide on its own how it will regulate arbitration agreements. For example, a particular state may have a severe problem with nursing home abuse or a severe problem with certain types of employers failing to comply with critical state regulations. Under our system of federalism, a state should be able to decide it is in the public interest for such disputes to be resolved publicly in court or in an administrative agency proceeding. Third, even under the existing law of *Southland*, business interests should already be accustomed to uncertainty regarding the enforcement of an arbitration clause. *Compare Figueroa v. THI of New Mexico*, 306 P.3d 480 (N.M. Ct. App. 2012) (invalidating arbitration clause in nursing home agreement), *with THI of New Mexico v. Patton*, 741 F.3d 1162 (10th Cir. 2014) (enforcing the identical

arbitration clause). Overruling *Southland* will not harm commercial expectations. Fourth, if *Southland* is overruled so that states are not bound by the FAA, then a federal court may compel arbitration while a state court may allow the same dispute to proceed in court. Whether a case is resolved in an arbitral forum or judicial forum should not make a difference. As repeatedly stressed by the Court in several cases, "a party [in arbitration] does not forgo the substantive rights afforded by [a statute]; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. Finally, *stare decisis* should not prevent the Court from overruling a flawed holding that unconstitutionally and expansively overrides state sovereignty. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling the infamous *Swift* doctrine that unconstitutionally permitted federal intrusion on state sovereignty for almost a century).

In sum, the Court should affirm the decision below because imposing the FAA, a purely procedural statute, on the courts of Kentucky represents an unconstitutional intrusion on state sovereignty.

CONCLUSION

The text of the FAA, its legislative history, and the historical background of the FAA's enactment demonstrate that the FAA was never intended to govern personal-injury claims. *Amicus* respectfully requests that the Court adopt a narrow, reasonable exclusion from the FAA's coverage for personal-injury claims that can

be asserted without reference to a contract. Furthermore, to respect federalism and prevent the unconstitutional overriding of state sovereignty, the Court should affirm the decision of the Kentucky Supreme Court.

Respectfully submitted,

IMRE S. SZALAI
Judge John D. Wessel Distinguished
Professor of Social Justice
Counsel of Record
LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW
7214 St. Charles Avenue, Box 901
New Orleans, LA 70118
(504) 861-5589
iszalai@loyno.edu

No. 16-32

IN THE

Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, *et al.*,

Petitioners,

v.

JANIS E. CLARK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KATE C. TODD
WARREN POSTMAN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

THOMAS R. MCCARTHY
Counsel of Record
CAMERON T. NORRIS*
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, Virginia 22201
(703) 243-9423
tom@consovoymccarthy.com

*Licensed in Tennessee, but not Virginia. Practice supervised by members of the firm.

Counsel for Amicus Curiae

December 14, 2016

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Liberal Federal Policy Favoring Arbitration Reflects the Fact that Arbitration is a Fair, Efficient, and Inexpensive Alternative to Litigation that Benefits Businesses and Individuals Alike. 4

II. The Approach of the Court Below Flouts the Federal Policy in Favor of Arbitration, Undermines Predictability, and Ignores the Supremacy Clause. 15

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Page

CASES

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009) 6

Adler v. Fred Lind Manor,
103 P.3d 773 (Wash. 2004) 13

Alexander v. Anthony Int'l, L.P.,
341 F.3d 256 (3d Cir. 2003) 13

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 6, 16

Am. Express Co. v. Italian Colors Restaurant,
133 S. Ct. 2304 (2013) 1, 13

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) ..... *passim*

Brunke v. Ohio State Home Servs., Inc.,
No. 08-9320, 2008 WL 4615578
(Ohio Ct. App. Oct. 20, 2008) 13

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) 5

Chavarria v. Ralphs Grocery Co.,
733 F.3d 916 (9th Cir. 2013) 13

Cited Authorities

Page

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 5

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) 4

DIRECTV, Inc. v. Imburgia,
136 S. Ct. 463 (2015) 1, 16, 18

Doctor's Associates v. Casarotto,
517 U.S. 681 (1996) 3, 4, 15, 16

Gandee v. LDL Freedom Enters., Inc.,
293 P.3d 1197 (Wash. 2013) 13

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 2, 4

KPMG LLP v. Cocchi,
132 S. Ct. 23 (2011) 16

Liebrand v. Brinker Rest. Corp.,
No. 07-3533, 2008 WL 2445544
(Cal. Ct. App. June 18, 2008) 13

Marmet Health Care Center, Inc. v. Brown,
132 S. Ct. 1201 (2012) 12, 16, 18

Mitsubishi Motors Corp. v.
Soler Chrysler-Plymouth,
473 U.S. 614 (1985) 6, 15

Cited Authorities

Page

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 4, 5, 17

Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn., 78 P.3d 766 (Idaho 2003) 13

Nitro-Lift Techs., LLC v. Howard, 133 S. Ct. 500 (2012) 2, 16, 18

Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013) 1

Preston v. Ferrer, 552 U.S. 346 (2008) 17

Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) 17

Southland Corp. v. Keating, 465 U.S. 1 (1984) 6, 17

Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138 (Ct. App. 1997) 13

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) 6

Woebse v. Health Care & Retirement Corp. of Am., 977 So. 2d 630 (Fla. Dist. Ct. App. 2008) 13

Page

Zaborowski v. MHN Gov't Servs., Inc.,
936 F. Supp. 2d 1145 (N.D. Cal. 2013), *aff'd*,
601 F. App'x 461 (9th Cir. 2014) 13

STATUTES AND OTHER AUTHORITIES

U.S. Const., Art. VI, cl. 2 17-18

9 U.S.C. § 2 2

15 U.S.C. § 2 12

2 I. Macneil, *et al.*, *Federal Arbitration Law* § 19.1.1 (1995) 3

AAA, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload* (2007) 7

AAA, *Consumer Due Process Protocol* 12

AAA, *Costs of Arbitration* (2016) 8

AAA, *Notice on Consumer Debt Collection Arbitrations* (2010) 10

Alicia Bannon, Brennan Ctr. for Justice, *Federal Judicial Vacancies: The Trial Courts* (2013) 8

Page

Am. Health Care Ass'n, *Special Study on Arbitration in the Long Term Care Industry* (2009) 9

Br. for the United States as *Amicus Curiae* Supporting Resp'ts, *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 367051 14

Calif. Disp. Resol. Inst., *Consumer and Employment Arbitration in California* (2004) 7

Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843 (2010) 10, 11

Christopher R. Drahozal & Samantha Zyontz, *Credit Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77 (2011) 10

Am. Bar Ass'n, *The Growing Crisis of Underfunding State Courts* (2011).....7

David Sherwyn *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557 (2005) 6

Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System*, 108 Penn St. L. Rev. 165 (2003).....8

Cited Authorities

Page

Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58-JUL Disp. Resol. J. 9 (2003) 9

Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777 (2003) 9

Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005) 11, 14

H.R. Rep. No. 68-96 5

H.R. Rep. No. 96 (1924) 4

H.R. Rep. No. 97-542 (1982) 5

Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* (April 2005) 14

JAMS, *Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* 12

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) 7

Cited Authorities

Page

Maura Dolan, *Budget Cuts Force California Courts to Delay Trials, Ax Services*, L.A. Times, Apr. 9, 2013 .....7, 8

Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-JAN Disp. Resol. J. 56 (2003-04).....11

Nat'l Ctr. for State Courts, *Examining the Work of State Courts* (2015) 6-7

Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004).....9, 11

Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict Resol. 267 (2008).... 14-15

S. Rep. No. 68-536 (1924) 5

Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251 (2006)..... 9-10

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783 (2008) 9

Page

U.S. Chamber of Commerce, *The CFPB's Flawed Arbitration "Study"* (2016) 10, 14

U.S. Courts, *U.S. District Courts—Judicial Business 2013* 7

U.S. Courts, *U.S. District Courts—National Judicial Caseload Profile* (2016) 6

William Glaberson, *Despite Cutbacks, Night Court's Small Dramas Go On*, N.Y. Times, June 2, 2011 8

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration resolves disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration,

---

1. The parties have consented in writing to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the Chamber's members have structured millions of contractual relationships around arbitration agreements. These members rely on the fair application of the FAA to ensure that they will not be deprived of the many benefits of arbitration. Because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012), the Chamber has a strong interest in ensuring state courts' uniform, consistent, and accurate application of the FAA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The FAA makes arbitration agreements "valid, irrevocable, and enforceable," except on grounds that would invalidate "any contract." 9 U.S.C. § 2. Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Unfortunately, as the Chamber has written before, the hostility toward arbitration is alive and well in the state courts. Despite numerous adverse decisions from this Court (including a few summary reversals), the state courts continue to devise "a great variety of devices and formulas" to avoid enforcing arbitration agreements. *Concepcion*, 563 U.S. at 342 (citation omitted).

The decision below is the latest "clever contribution" to this "genre." Pet. App. 99a (Abramson, J., dissenting). The Supreme Court of Kentucky announced an "explicit-reference" rule for powers of attorney: an attorney-in-fact cannot bind a principal to an arbitration agreement unless

the power of attorney expressly grants him that authority. *Id.* at 44a (majority opinion). The court grounded this explicit-reference rule in the idea that waivers of the right to a civil jury must be "knowing and voluntary." *Id.* at 47a-48a. But its disdain for arbitration was palpable: the Kentucky Supreme Court described arbitration as a threat to the "divine God-given right" to a civil jury—the only "*sacred*" right recognized in the Kentucky Constitution. *Id.* at 43a.

The Chamber agrees with the petitioners that Kentucky's explicit-reference rule is preempted by the FAA. As Petitioners explain, the rule "stands in stark defiance of this Court's repeated holdings that the FAA preempts state-law rules that disfavor arbitration agreements." Br. for Pet'rs at 10. In particular, the decision below runs directly contrary to the Court's decision in *Doctor's Associates v. Casarotto*, 517 U.S. 681, 687-88 (1996), which held that the FAA preempted a Montana statute that mandated notice of an arbitration provision on the first page of a contract. *See* Br. for Pet'rs at 17-19. The Court had no difficulty concluding that the FAA preempted the Montana law because it imposed "a special notice requirement [upon arbitration] not applicable to contracts generally." 517 U.S. at 687. As the Court made clear, a "state [law] requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted." *Id.* (quoting 2 I. Macneil, *et al.*, *Federal Arbitration Law* § 19.1.1 (1995)). Kentucky's explicit-reference rule does precisely that.

The Chamber writes separately to explain that the liberal federal policy favoring arbitration agreements is grounded in the congressional and judicial recognition that

arbitration is a fair, efficient, and inexpensive alternative to litigation. The decision below should be corrected because it runs afoul of that policy, reflects continued hostility to arbitration, upsets settled expectations, and undermines the proper operation of the Supremacy Clause.

ARGUMENT

I. The Liberal Federal Policy Favoring Arbitration Reflects the Fact that Arbitration is a Fair, Efficient, and Inexpensive Alternative to Litigation that Benefits Businesses and Individuals Alike.

The FAA "establishes 'a liberal federal policy favoring arbitration.'" *Concepcion*, 563 U.S. at 339 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). This pro-arbitration policy reflects the fact that arbitration is a faster and cheaper alternative to litigation that is fair and beneficial to businesses and individuals. Indeed, both Congress and this Court have recognized the many benefits of arbitration. And the available data confirm that arbitration is cheaper and faster than litigation and produces fair outcomes.

Congress enacted the FAA nearly a century ago "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer*, 500 U.S. at 24. Congress's intended goal was "to place an arbitration agreement 'upon the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, at 1 (1924)). Accordingly, the FAA "preclude[s] States from singling out arbitration provisions for suspect status." *Casarotto*, 517 U.S. at 687.

Congress wanted to ensure that contractual arbitration rights are "on equal footing" with all other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), because it recognized the many advantages of arbitration. The House Report accompanying the FAA stated that "the costliness and delays of litigation ... can be eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." H.R. No. 68-96, at 2. The Senate Report likewise stated that the FAA was needed "to avoid the delay and expense of litigation." S. Rep. No. 68-536, at 3 (1924). Even then, Congress recognized that the expenses and delays associated with litigation tend to increase over time. *See id.* Arbitration thus benefits all disputants—"corporate interests, as well as ... individuals." *Id.*

More than a half-century after the FAA was enacted, Congress had not changed its mind about the "many" benefits of arbitration. H.R. Rep. No. 97-542, at 13 (1982). Indeed, it expounded upon them, emphasizing that arbitration "is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices." *Id.* Congress also explained that "arbitration could relieve some of the burdens on the overworked Federal courts." *Id.*

This Court likewise has acknowledged the "real benefits" of arbitration. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). For more than three decades, the Court consistently has enforced the liberal

federal policy favoring arbitration, recognizing that the FAA "creates federal substantive law requiring parties to honor arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984); *accord Moses H. Cone*, 460 U.S. at 24. And in doing so, the Court repeatedly has highlighted the "advantages" of arbitration. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); *see, e.g., Concepcion*, 563 U.S. at 345 (arbitration "reduc[es] the cost and increas[es] the speed of dispute resolution"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (arbitration provides "lower costs" and "greater efficiency and speed"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985) (emphasizing the relative "simplicity, informality, and expedition of arbitration"). Like Congress, the Court has explained that these advantages inure to the benefit of disputants—businesses and "individuals"—"who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.

Data back up what Congress and this Court have recognized. Arbitration is faster than traditional litigation. *See* David Sherwyn *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1572 (2005) ("[F]ew dispute the assertion that arbitration is faster than litigation."). In June 2016, the median civil lawsuit in federal court took 27.1 months to reach trial. *See* U.S. Courts, *U.S. District Courts—National Judicial Caseload Profile* (2016), goo.gl/Ogw9jB. State courts, which handle more cases than federal courts, have even worse workloads. *Compare* Nat'l Ctr. for State Courts, *Examining the Work of State Courts*

7 (2015), goo.gl/thJOxA (reporting 16.9 million new civil cases filed in state court in 2013), *with* U.S. Courts, *U.S. District Courts—Judicial Business 2013*, goo.gl/jxOAqG (reporting 284,604 new civil cases filed in federal court in 2013). Arbitration, by contrast, is estimated to take "less than half of the time required for civil litigation." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998). Arbitrations with the American Arbitration Association ("AAA")—the largest arbitration provider in the country—take an average of only four to six months. *See* AAA, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload* (2007), goo.gl/Lqqmf7. Similarly, a study by the California Dispute Resolution Institute found that consumer and employment disputes were resolved in an average of 116 days in arbitration. *See* Calif. Disp. Resol. Inst., *Consumer and Employment Arbitration in California* 19 (2004), goo.gl/YXiWw7.

The increased speed of arbitration is due primarily to its decreased procedural complexity. But it is also attributable to the fact that the courts are clogged. Forty states had to cut funding to their courts in 2010, according to a report by the American Bar Association's Task Force on the Preservation of the Justice System, which was co-chaired by David Boies and Theodore B. Olson. *See* Am. Bar Ass'n, *The Growing Crisis of Underfunding State Courts* (2011), goo.gl/exBnPe. The effects of these funding cuts have been devastating: in California, "[a]t least 53 courthouses have closed," and "[c]ourts in 20 counties are closed for at least one day a month." Maura Dolan, *Budget Cuts Force California Courts to Delay Trials, Ax Services*, L.A. Times, Apr. 9, 2013, goo.gl/Rmmu44. These and other court closures "have forced some San

Bernardino residents to drive up to 175 miles one way to attend to a legal matter." *Id.* In New York City, the wait for a court date is four times longer than it was before the budget cuts. *See* William Glaberson, *Despite Cutbacks, Night Court's Small Dramas Go On*, N.Y. Times, June 2, 2011, goo.gl/UWXB0D.

Although the vast majority of civil claims are filed in state court, the federal courts also have extraordinarily high caseloads, especially at the trial level, where the backlogs are particularly severe. The Brennan Center for Justice has found that "the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007." Alicia Bannon, Brennan Ctr. for Justice, *Federal Judicial Vacancies: The Trial Courts* 5 (2013), goo.gl/WDcAO2. While "[a] judge in 1992 had an average of 388 pending cases on his or her docket," "[b]y 2012, the average caseload had jumped to 464 cases—a 20 percent increase." *Id.*

Arbitral forums do not have comparable backlogs and can resolve disputes rapidly. Moreover, the hundreds of thousands of arbitrations conducted each year reduce the caseloads of state and federal courts, improving their efficiency as well. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System*, 108 Penn St. L. Rev. 165, 166-67 & n.11 (2003).

Arbitration is also far cheaper than litigation. The AAA charges consumers a $200 filing fee and requires businesses to shoulder the rest of the costs. *See* AAA, *Costs of Arbitration* 1 (2016), goo.gl/vltYGE. For many

employees, arbitration costs *nothing*—their filing fees and attorney's fees are shifted to the employer. *See* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003).

In litigation, by contrast, unrepresented parties have little hope of navigating the complex procedures that apply in court. They must hire a lawyer, whose hourly billing rate far exceeds the cost of proceeding in arbitration and, in many cases, the entire value of their claim. If the plaintiff retains the lawyer on a contingency basis, the lawyer's compensation substantially reduces the amount of any award. Accordingly, the cost savings of arbitration allow individuals to bring small-value claims that would be priced out of court and larger claims that would be substantially reduced by contingency fees. *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 791-92 (2008); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58-JUL Disp. Resol. J. 9, 10-11 (2003); Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), *available at* goo.gl/nAqVXe.

The streamlined procedures of arbitration make it cheaper for businesses too. Nursing homes, for example, have found that arbitration is 41% less expensive to administer than litigation. *See* Am. Health Care Ass'n, *Special Study on Arbitration in the Long Term Care Industry* 8 (2009), goo.gl/4A7ozo. Businesses often pass these savings on to consumers and employees in the form of lower prices and higher wages. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration*

Agreements—with Particular Consideration of Class Actions and Arbitration Fees, 5 J. Am. Arb. 251, 254-56 (2006).

Arbitration not only is faster and cheaper than litigation, but it also allows plaintiffs to vindicate their claims with at least as much success as litigation. Studies show that individuals are no less likely to prevail in arbitration than in court. For example, consumers who arbitrate "get decisions on the merits more frequently and more quickly than they would in court," and they "win at least as often, if not more often, than they do in court." U.S. Chamber of Commerce, *The CFPB's Flawed Arbitration "Study"* 10 (2016), goo.gl/p9JSzt [hereinafter Chamber, *CFPB's Flawed Study*]. A 2010 study by scholars Christopher Drahozal and Samantha Zyontz found that plaintiffs who file consumer claims with the AAA win relief 53.3% of the time. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 897 (2010) [hereinafter Drahozal & Zyontz, *Empirical Study*]. This rate compares favorably with plaintiffs in state and federal court, who prevail roughly 50% of the time. *Id.* Another study by these authors found that consumers prevailed as or more often in debt-collection arbitration than in court, *see* Christopher R. Drahozal & Samantha Zyontz, *Credit Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011)—although, in 2010, the AAA imposed a moratorium on debt-collection arbitrations in part at the urging of so-called consumer advocates, *see* AAA, *Notice on Consumer Debt Collection Arbitrations* (2010), goo.gl/JlgOm8.

The Drahozal and Zyontz studies are consistent with

studies of arbitration in other contexts. For example, a 2005 study by Ernst & Young examined sample AAA casefiles of consumer cases. The study concluded that consumers prevailed more often than businesses—55% of the time—and received a favorable result almost 80% of the time. *See* Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005). Similarly, a study of employment-discrimination suits found that 46% of those who arbitrated won, compared to 34% of those who litigated; that only 4% of litigated cases ever reached trial; and that arbitrations were resolved 36% faster. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-JAN Disp. Resol. J. 56, 56-58 (2003-04). In 2004, the National Workrights Institute compiled all available employment-arbitration studies and concluded that employees were 19% more likely to win in arbitration than in litigated cases. Nat'l Workrights Inst., *supra*. Median awards received by plaintiffs were the same as in court, although the distorting effect of occasional large jury awards resulted in higher average recoveries in litigation. *Id.*

And just as in court, plaintiffs who win in arbitration recover not only compensatory damages but also "other types of damages, including attorneys' fees, punitive damages, and interest." Drahozal & Zyontz, *Empirical Study*, *supra*, at 902. In particular, Drahozal and Zyontz found that 63.1% of prevailing consumer claimants who sought attorney's fees were awarded them. *Id.*

Arbitration is fair too. Arbitrators and courts ensure that arbitration provisions will be enforced only if they meet basic guarantees of fairness and due process. And companies increasingly have opted to make arbitration provisions even more favorable to consumers.

The nation's two leading arbitration service providers, the AAA and JAMS, each have standards to ensure that arbitrations are conducted fairly. The AAA's Consumer Due Process Protocol requires independent and impartial arbitrators, reasonable costs, convenient hearing locations, and remedies comparable to those available in court. *See* AAA, *Consumer Due Process Protocol*, goo.gl/fWwHQ1. The AAA will not administer a consumer arbitration unless the arbitration is consistent with the Due Process Protocol. Likewise, JAMS will not administer a pre-dispute arbitration clause between a company and a consumer unless the clause complies with "minimum standards of fairness." JAMS, *Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, goo.gl/tpXOOb. Both entities recognize that independence, due process, and low costs for the consumer are vital elements of a fair and accessible arbitration system.

The courts provide another layer of oversight. State and federal courts are empowered by Congress to invalidate arbitration clauses that run afoul of generally-applicable principles of state contract law, such as unconscionability. 15 U.S.C. § 2; *see Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (stating that courts may invalidate arbitration provisions under standards "that are not specific to arbitration"). Courts have not hesitated to strike down arbitration provisions

that subject consumers to unfair procedures. For example, courts routinely invalidate arbitration provisions that purport to limit a consumer's right to recover certain types of damages;[2] provisions that impose excessive fees;[3] and provisions that unreasonably shorten statutes of limitation.[4]

At the same time, the vast majority of arbitration agreements do not contain these defects. As companies have gained more experience with arbitration, they have sought to make arbitration even *more* favorable for

---

2. *See, e.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003) (provision barring punitive damages); *Woebse v. Health Care & Retirement Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008) (same).

3. *See, e.g., Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013) (provision requiring employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the claim"); *Brunke v. Ohio State Home Servs., Inc.*, No. 08-9320, 2008 WL 4615578 (Ohio Ct. App. Oct. 20, 2008) (same); *Liebrand v. Brinker Rest. Corp.*, No. 07-3533, 2008 WL 2445544 (Cal. Ct. App. June 18, 2008) (same); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003) (same); *see also Am. Express*, 133 S. Ct. at 2310-11 (reaffirming that a challenge to an arbitration agreement might be successful if "filing and administrative fees attached to arbitration ... are so high as to make access to the forum impracticable").

4. *See, e.g., Zaborowski v. MHN Gov't Servs., Inc.*, 936 F. Supp. 2d 1145 (N.D. Cal. 2013) (provision shortening the statute of limitations to 6 months), *aff'd*, 601 F. App'x 461 (9th Cir. 2014); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004) (180 days); *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (30 days); *Alexander*, 341 F.3d at 256 (same); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Ct. App. 1997) (1 year).

consumers, not less. As the Solicitor General of the United States has recognized, "many companies have modified their agreements to include streamlined procedures and premiums designed to encourage customers to bring claims." Br. for the United States as *Amicus Curiae* Supporting Resp'ts at 28, *Am. Express*, 133 S. Ct. 2304 (No. 12-133), 2013 WL 367051.

Unsurprisingly then, individuals who arbitrate are generally pleased with the experience. In a 2005 survey, most individuals who had participated in arbitration reported that it was faster (74 percent), simpler (63 percent), and less expensive (51 percent) than litigation. *See* Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 5 (conducted for U.S. Chamber Institute for Legal Reform, April 2005). Two-thirds reported that they would likely use arbitration again. *Id.* Similarly, a 2013 survey of the arbitration system for Kaiser Foundation Health Plan revealed that "almost 50% of the parties and attorneys who went through arbitrations that year reported that the arbitration system was better than going to court, another 38% reported that it was the same as going to court—and only 14% reported it was worse." Chamber, *CFPB's Flawed Study*, *supra*, at 12. Nearly 70% of the consumers surveyed by Ernst & Young likewise said they were "satisfied" or "very satisfied" with the arbitration process. *See* Ernst & Young, *supra*.

These individuals understand what the data reflect. Without arbitration, they would be "far worse off, for they would find it far harder to obtain a lawyer, find the cost of dispute resolution far more expensive, wait far longer to obtain relief and may well never see a day in court." Peter B. Rutledge, *Who Can Be Against Fairness? The*

Case Against the Arbitration Fairness Act, 9 Cardozo J. Conflict Resol. 267, 267 (2008).

II. The Approach of the Court Below Flouts the Federal Policy in Favor of Arbitration, Undermines Predictability, and Ignores the Supremacy Clause.

In the cases below, Respondents had the authority to enter into contracts on behalf of their principals. And Respondents each elected to exercise that authority by signing arbitration agreements that indisputably encompass the underlying disputes. The Kentucky trial court rightly enforced those arbitration agreements, concluding that the disputes could be adjudicated only through arbitration pursuant to the terms of those agreements. Nearly five years later, however, those disputes remain unresolved, even though the parties contracted for the "simplicity, informality, and expedition of arbitration," *Mitsubishi Motors*, 473 U.S. at 628. This is because the Kentucky Supreme Court announced an "explicit reference" rule for powers of attorney: that an attorney-in-fact cannot bind a principal to an arbitration agreement unless the power of attorney explicitly grants her that authority. Pet. App. 44a.

It is hard to see how the explicit-reference rule could do anything other than "singl[e] out arbitration provisions" for disfavored treatment. *Casarotto*, 517 U.S. at 687. Yet the Kentucky Supreme Court claimed that its rule is "consistent" with the FAA, framing it not as an arbitration-specific rule, but as a rule respecting jury-trial rights. Pet. App. 46a. This sleight of hand does not work. As the dissent explained, "arbitration agreements are distinguished [from other contracts] by their effect

on trial rights." *Id.* at 89a (Abramson, J., dissenting); *accord Concepcion*, 563 U.S. at 342 (explaining that a rule prohibiting contracts that permit non-jury trials would have a "disproportionate impact on arbitration agreements"); *id.* at 362 (Breyer, J., dissenting) (agreeing). If framing a rule in terms of the right to a jury trial was enough, States would have carte blanche to discriminate against arbitration. Indeed, as Petitioners point out, to uphold the decision below would mean that Montana could revive the very statute invalidated in *Casarotto* if it "replace[d] the word 'arbitration' with the term 'waiver of a jury trial.'" Br. for Pet'rs at 29-30.

It would be bad enough if this was an isolated case of a state court flouting the federal policy favoring arbitration. Sadly, the decision below continues the unfortunate trend of state courts inventing new "devices and formulas" to circumvent the FAA. *Concepcion*, 563 U.S. at 342; *see Imburgia*, 136 S. Ct. 463; *Nitro-Lift*, 133 S. Ct. 500 (per curiam); *Marmet Health*, 132 S. Ct. 1201 (per curiam); *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (per curiam). For the Chamber and its members, combatting these efforts has become a never-ending game of Whack-a-Mole: as soon as one method of circumventing the FAA is defeated, another one pops up.

This relentless creativity from the states is bad for American businesses. Many of the Chamber's members have "written contracts relying on [this Court's FAA precedents] as authority." *Allied-Bruce*, 513 U.S. at 272. They need to know that their arbitration agreements will be enforced so they can anticipate the costs of dispute resolution and plan their affairs accordingly. But the states' ongoing efforts to avoid the FAA cast a pall

over every arbitration agreement, creating widespread uncertainty for businesses. American businesses are left wondering, "What will the states think of next?"

Even when the states' efforts fail, they require years of litigation to undo—eliminating the very efficiencies that arbitration is supposed to provide. And the state courts' receptivity to new ways of limiting the enforceability of arbitration agreements means that litigants are encouraged to keep raising them. The resulting satellite litigation is wasteful, time-consuming, and does nothing to resolve the underlying merits of disputes. The irony, of course, is that "prolonged litigation" is "one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland*, 465 U.S. at 7. And it contravenes "Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Moses H. Cone*, 460 U.S. at 22).

On top of that, the decision below reads like a throwback to "the old judicial hostility to arbitration." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (citation omitted). The Kentucky Supreme Court described arbitration as an affront to the "divine God-given right" to a civil jury. Pet. App. 43a. To allow an attorney-in-fact to sign an arbitration agreement, the court reasoned, would be as "absurd" as allowing him to "bind the principal to personal servitude." *Id.* at 42a.

Perhaps worse, the decision below exhibits hostility not only to arbitration, but to the proper operation of the Supremacy Clause. The Federal Arbitration Act is one of the "Laws of the United States." U.S. Const., Art. VI,

cl. 2. This Court's long line of precedent enforcing the liberal federal policy in favor of arbitration represents the "authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *Imburgia*, 136 S. Ct. at 468.

When state courts refuse to apply this Courts' precedents on arbitration, this Court has not hesitated to intervene to remind them that they are bound by its interpretations of federal statutes. *See, e.g.*, *Marmet Health*, 132 S. Ct. at 1202 ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." (citing U.S. Const., Art. VI, cl. 2.)). Because state supreme-court decisions often represent the final say on the enforcement of arbitration agreements, such intervention is "a matter of great importance" so that "state supreme courts adhere to a correct interpretation of the [FAA]." *Nitro-Lift*, 133 S. Ct. at 501. And it is particularly important now—at a time when the state courts continue to disregard this Court's admonitions.

Enough is enough. The "old judicial hostility to arbitration" has gotten, in a word, old. The FAA is "the supreme Law of the Land" and has been for nearly 100 years. *Nitro-Lift*, 133 S. Ct. at 503 (quoting U.S. Const., Art. VI, cl. 2). This case presents an opportunity to reaffirm that courts must stop inventing new ways to circumvent the FAA, this Court's precedents, and the liberal federal policy favoring arbitration.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be reversed.

Respectfully submitted,

KATE C. TODD
WARREN POSTMAN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H. Street, NW
Washington, DC 20062

THOMAS R. MCCARTHY
Counsel of Record
CAMERON T. NORRIS*
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, Virginia 22201
(703) 243-9423
tom@consovoymccarthy.com

*Licensed in Tennessee, but not Virginia. Practice supervised by members of the firm.

Counsel for Amicus Curiae

December 14, 2014

RECORD AND BRIEF

No. 16-32

Supreme Court, U.S.
FILED
DEC 12 2016
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION,

Petitioners,

v.

JANIS E. CLARK, Executrix of the Estate of OLIVE G. CLARK, deceased, and on behalf of the wrongful death beneficiaries of OLIVE G. CLARK and BEVERLY WELLNER, Individually and on Behalf of the Estate of JOE P. WELLNER, deceased, and on Behalf of the Wrongful Death Beneficiaries of JOE P. WELLNER,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF AMICUS CURIAE FOR GENESIS HEALTHCARE, INC., DIVERSICARE HEALTHCARE SERVICES, INC., GGNSC LOUISVILLE MT. HOLLY LLC D/B/A GOLDEN LIVINGCENTER – MT. HOLLY, BROOKDALE SENIOR LIVING INC., SIGNATURE HEALTHCARE, LLC, HCR MANORCARE AND KENTUCKY PARTNERS MANAGEMENT, LLC IN SUPPORT OF THE PETITIONERS

DONALD L. MILLER, II
**Counsel of Record*
KRISTIN M. LOMOND
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
9300 Shelbyville Road, Suite 400
Louisville, KY 40222
(502) 423-6390
dmiller@qpwblaw.com
klomond@qpwblaw.com
Counsel for Amici Curiae

December 12, 2016

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

QUESTION PRESENTED

Whether the FAA preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
IDENTITY AND INTEREST OF THE *AMICI*	1
SUMMARY OF ARGUMENT	6
ARGUMENT IN SUPPORT OF THE PETITIONERS	10
I. *WHISMAN*'S RESTRICTIONS ON ARBITRATION RIGHTS POSE A SUBSTANTIAL THREAT TO THE ENTIRE LONG-TERM CARE INDUSTRY	11
A. Nursing Home Arbitration Agreements Benefit All Parties Involved in Claims	12
B. *Whisman* Results in Uncertainty in Kentucky Law	17
II. THE KENTUCKY COURT'S DECISION IN *WHISMAN* CONSTITUTES THE STATE'S LATEST ATTEMPT TO EVADE *CONCEPCION* AND THE FAA	22
III. KENTUCKY'S FEDERAL DISTRICT COURTS UNANIMOUSLY DISAGREE WITH *WHISMAN*'S REASONING, RESULTING IN RACE TO COURTHOUSE	26
CONCLUSION	33

TABLE OF AUTHORITIES

Page

CASES

Allgeyer v. Louisiana, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897) 13

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) 3, 12, 13

American Health Care Association et al. v. Burwell, Case 3:16-cv-00233-MPM-RP (N.D. MI Nov. 7, 2016) 21

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) 7, 10, 23, 25

Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010) 22

Bayer CropScience LP v. Schafer, 2011 Ark. 518, 385 S.W.3d 822 (2011) 22

Brandenburg Health Facilities, LP v. Mattingly, 2016 WL 3448733 (W.D. Ky. June 20, 2016) 28

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) 5

DirecTV, Inc. v. Imburgia, 577 U.S. ___, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015) 10

Diversicare Highland, LLC v. Lee, 2016 WL 3512256 (W.D. Ky. June 21, 2016) 28

Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306 (Ky. 2016) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982) 8

GGNSC Louisville Hillcreek, LLC v. Watkins, 2016 WL 815295 (W.D. Ky. Feb. 29, 2016) 28, 31

GGNSC Louisville Mt. Holly, LLC v. Leslie Guess Mohamed-Vall, Case No. 3:16-cv-136-DJH (W.D. Ky. April 6, 2016) 28, 32

GGNSC Stanford, LLC v. Gilliam, ___ F. Supp. 3d ___, 2016 WL 4700135 (E.D. Ky. Sept. 7, 2016) 28

Hall St. Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008) 5

Hines v. Davidowitz, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941) 25

Kindred Healthcare, Inc. v. Cherolis, 2013 WL 5583587 (Ky. App. Oct. 11, 2013), *vacated on remand by Kindred Healthcare, Inc. v. Cherolis*, 2016 WL 6134910 (Ky. App. Oct. 21, 2016) 18

Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895 (Ill. 2010) 22

Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) 7, 8, 10, 25

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) 24

Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012) 7

TABLE OF AUTHORITIES – Continued

Page

Owensboro Health Facilities, L.P. v. Henderson, 2016 WL 2853569 (W.D. Ky. May 13, 2016).....28, 32

Perry v. Thomas, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).....24

Pine Tree Villa, Inc., LLC d/b/a Regis Woods v. Coulter, 2016 WL 3030185 (W.D. Ky. May 25, 2016).....28, 32

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012).....23, 24

Preferred Care of Delaware, Inc. v. Crocker, 173 F. Supp. 3d 505 (W.D. Ky. 2016)..... 18, 27, 28, 31, 32

Preferred Care of Delaware, Inc. v. Hopkins, 2016 WL 3546407 (W.D. Ky. June 23, 2016).....28, 32, 33

Riney v. GGNSC Louisville St. Matthews, LLC d/b/a Golden Living Center – St. Matthews, 2016 WL 2853568 (W.D. Ky. May 13, 2016).....28, 32

Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959).....7

Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).....24

Truax v. Corrigan, 257 U.S. 312 (1921).....28

Williams v. Wilson, 972 S.W.2d 260 (Ky. 1998).....22

Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).....30

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. XIV, Due Process Clause 13

U.S. CONST. art. VI, cl.2, Supremacy Clause 10

KENTUCKY CONST. § 250 13

STATUTES

Federal Arbitration Act, 9 U.S.C. §§ 1-16 .....*passim*

Kentucky Revised Statute § 1.030(8).....26

Kentucky Revised Statute § 1.040(5).....26

Kentucky Revised Statute § 386.093 18

REGULATIONS

42 CFR Part 483, Subpart B – Requirements for Long Term Care Facilities 16

OTHER

$65 billion in Medicare cuts to rock U.S. nursing homes over 10 years, analysis shows, McKnight's Long-Term Care News (Aug. 2, 2012), available online at: http://www.mcknights.com/65-billion-in-medicare-cuts-to-rock-us-nursing-homes-over-10-years-analysis-shows/article/253036.....22

American Health Care Association, *A Report on Shortfalls in Medicaid Funding for Nursing Center Care,* available online at: https://www.ahcancal.org/research_data/funding/Pages/2015-Medicaid-Shortfall-Report.aspx 4

TABLE OF AUTHORITIES – Continued

Page

American Health Care Association Special Study on Arbitration in the Long Term Care Industry, AON Global Risk Consultants, June 16, 2009, available online at: https://www.ahcancal.org/research_data/liability/Documents/2009%20Special%20Study%20on%20Arbitration%20in%20Long%20Term%20Care.pdf 12, 15, 17

CMS Nursing Home Data Compendium 2015, available online at: https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium_508-2015.pdf 4

Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. LAW REVIEW 1243 (1999) 27

Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME LAW REVIEW 235 Appendix (2014) 27

Long Term Care – *2015 General Liability and Professional Liability Actuarial Analysis*, AON Global Risk Consulting, available online at: https://www.ahcancal.org/research_data/liability/Documents/2015%20General%20Liability%20and%20Professional%20Liability%20Actuarial%20Analysis%20Report.pdf 14, 15, 16

Medicare and Medicaid Programs; Reform of Reuirements for Long-Term Care Facilities; Arbitration Rule, 81 Fed. Reg. 68,688 (Oct. 4, 2016) 15, 21

TABLE OF AUTHORITIES – Continued

Page

Population Ageing in the United States of America: Implications for Public Programmes, Oxford International Journal of Epidemiology, 2002, Vol. 31, Issue 4, pp. 776-781, available online at: http://ije.oxfordjournals.org/content/31/4/776.full.....20

Recent Trends in the Nursing Home Liability Insurance Market, U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, June 2006, available online at: http://Aspe.Hhs.Gov/Daltcp/Reports/2006/Nhliab.pdf.....16

U.S. Department of Health & Human Services, Admin., on Aging, *Aging Statistics* (updated through 2015), available online at: http://www.aoa.gov/aoaroot/aging_statistics/index.aspx.....21

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Genesis Healthcare, Inc., Diversicare Healthcare Services, Inc., GGNSC Louisville Mt. Holly LLC d/b/a Golden LivingCenter – Mt. Holly, Brookdale Senior Living Inc., Signature HealthCARE, LLC, HCR ManorCare and Kentucky Partners Management, LLC, respectfully submit this *Amicus Curiae* brief in support of Petitioners.[1]

IDENTITY AND INTERESTS OF THE *AMICI*

Amicus curiae Genesis Healthcare, Inc. is a holding company with subsidiaries that, on a combined basis, comprise one of the nation's largest post-acute care providers with more than 500 skilled nursing centers and senior living communities in 34 states nationwide at present. Genesis subsidiaries also supply rehabilitation therapy to more than 1,700 locations in 45 states and the District of Columbia.

Amicus curiae Diversicare Healthcare Services, Inc., headquartered in Brentwood, Tennessee, employs 9,000 people offering wide-ranging post-acute care in

[1] Pursuant to Supreme Court Rule 37.3, *Amici* provided notice of intent to file this brief to counsel of record for the parties, who provided their written consent to its filing. The undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

multiple settings, to include: complex medical, skilled nursing, short-term rehabilitative, long-term residency, memory assistance, respite and hospice care. Through a subsidiary, Diversicare operates 76 skilled nursing and long-term care facilities in ten Southern and Midwestern states.

Amicus curiae GGNSC Louisville Mt. Holly LLC d/b/a Golden LivingCenter – Mt. Holly is a member of a family of companies based in Plano, Texas. The Golden Living family of companies includes Golden LivingCenters, Aegis Therapies, AseraCare, and 360 Healthcare Staffing. There are 300 Golden LivingCenters in 21 states. Golden Living also offers assisted living services at more than 30 of its locations. Golden Living companies provide services to over 1,000 nursing homes, hospitals, and other healthcare organizations in 40 states and the District of Columbia. The Golden Living family of companies has more than 40,000 employees who provide healthcare to over 60,000 patients daily.

Amicus curiae Brookdale Senior Living Inc., based in Brentwood, Tennessee, operates 647 senior care communities in 36 states, including 74 retirement centers, 440 assisted living communities and 41 continuing care retirement centers. Brookdale communities have the ability to serve approximately 66,000 residents daily.

Amicus curiae Signature HealthCARE, LLC, is a Kentucky based long-term healthcare and rehabilitation company with 143 different facility locations (46

of them in Kentucky) that span across 11 different states, providing jobs to nearly 24,000 employees. A growing number of Signature centers are earning five-star ratings from the Centers for Medicare & Medicaid Services. Signature was named "Best Places to Work in KY" in 2014 and 2015 by the Kentucky Chamber of Commerce, and was nationally awarded by Modern Healthcare in 2013 and 2015.

Amicus curiae HCR ManorCare is a leading provider of short-term, post-hospital services and long-term care with a network of more than 500 skilled nursing and rehabilitation centers, memory care communities, assisted living facilities, outpatient rehabilitation clinics, and hospice and home healthcare agencies. Based in Toledo, Ohio, ManorCare employs more than 50,000 caregivers nationwide.

Amicus curiae Kentucky Partners Management, LLC, based in Plano, Texas, manages 21 skilled nursing facilities in the Commonwealth of Kentucky, which includes 1,762 nursing beds. Services offered at these nursing facilities include skilled nursing, short-term rehabilitative, long-term residency, and hospice care.

The Court has long recognized the many advantages of arbitration, including expense savings. *See, e.g.*, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 280, 115 S. Ct. 834, 843, 130 L. Ed. 2d 753 (1995) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing

and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . ."). These features are particularly important for an industry so heavily reliant on government payor sources. For instance, in the fourth quarter of 2014, 15,634 nursing homes participated in the Medicare and Medicaid programs. *See, e.g.*, CMS Nursing Home Data Compendium 2015.[2]

An April 2016 American Health Care Association ("AHCA") commissioned study, *A Report on Shortfalls in Medicaid Funding for Nursing Center Care*, noted the nation's projected unreimbursed Medicaid costs to exceed $7 billion in 2015.[3] This shortfall amounts to approximately $22.46 per Medicaid patient/per day. *Id.* The 2015 projected shortfall increased 6.0% from the preceding year's projection. *Id.* For a typical 100-bed facility, where 63% of residents rely on Medicaid for coverage, this shortfall places losses at more than $1,415 dollars each day, exceeding $516,000 annually. On average, Medicaid reimbursed nursing center providers only 89.4%, or 89 cents on the dollar, of their projected allowable costs incurred on behalf of Medicaid patients. *Id.* at p.4.

This matter presents issues of significant importance to *Amici* because long-term care facilities enter into thousands of predispute arbitration agreements

---

[2] Available online at: https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium_508-2015.pdf.

[3] Available online at: https://www.ahcancal.org/research_data/funding/Pages/2015-Medicaid-Shortfall-Report.aspx.

every year, many executed by an attorney-in-fact for the resident like the underlying cases here. Predispute arbitration agreements represent efficient, cost-effective alternatives to traditional civil litigation and are vital to *Amici* and the entire long-term care industry. However, following the Supreme Court of Kentucky's Opinion in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016), Kentucky state courts now refuse to enforce otherwise valid arbitration agreements. *Amici* encounter significant burdens from state courts' refusals to enforce arbitration contracts, like in Kentucky, whether because of state court hostility, misunderstanding of federal law and preemption, unconscionability principles, or other judicially-enacted state laws intentionally designed to avoid arbitration contract enforcement.

Congress passed the Federal Arbitration Act ("FAA") to combat the open judicial hostility to arbitration agreements so apparent here. *See Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581, 128 S. Ct. 1396, 1402, 170 L. Ed. 2d 254 (2008) (*citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)). *Whisman* embodies Kentucky state courts' latest creative attempt to avoid the FAA's preemptive mandate requiring arbitration contracts to be enforced on equal footing with other contracts and according to their terms. The Kentucky court refused to acknowledge this Court's arbitration precedent applies to it, and instead denounced the FAA as inapplicable to its reinvented interpretation of "state agency law." The *Whisman* court simply

ignored the well-established fundamental legal principle that, via the Supremacy Clause of the United States Constitution, Kentucky state law contrary to the FAA is invalid.

Amici have a genuine interest in the outcome of this case and in seeking uniform application of the FAA and consistent enforcement of valid arbitration agreements across the United States. Congress recognized arbitration contracts needed heightened protection to prohibit the flagrant hostility that – in fact – occurred here. Congress enacted the FAA as a method to resolve disputes quickly, efficiently and economically. Yet, Kentucky's highest state court acted with no regard for the FAA or the body of federal substantive law interpreting it. Instead, the Kentucky state court definitively denounced agent-executed arbitration contracts as neither favored nor protected in Kentucky. The Kentucky court's decision frustrates this Court's arbitration precedent and the FAA's policies and goals. *Amici* join Petitioners and encourage this Court to reverse the Supreme Court of Kentucky's decision in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016).

SUMMARY OF THE ARGUMENT

For the past ninety years, this Court has repeatedly rebuked the very "widespread judicial hostility to arbitration" that Congress enacted the Federal Arbitration Act to counter. *See, e.g., AT&T Mobility LLC v.*

Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). In *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012), this Court mandated, "State and federal courts must enforce the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., with respect to all arbitration agreements covered by that statute." Again, in *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam), the Court proclaimed, "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation."

Seemingly undaunted by these reprimands, state courts continue to exhibit the same hostilities that prompted the FAA, employing "'a great variety' of 'devices and formulas'" to avoid enforcing arbitration agreements. *Concepcion*, 563 U.S. at 342, 131 S. Ct. at 1747 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016) emerges as the Supreme Court of Kentucky's latest and most elaborate "device," disguised as an interpretation of state agency law to avoid enforcing agent-executed arbitration contracts, particularly those utilized in long-term care settings.

Despite *Concepcion*'s, *Marmet Health*'s and *Nitro-Lift*'s stern admonitions, Kentucky and other state courts persist with their interpretations of contract defenses, unconscionability concerns, state public policy

proclamations and similar rationales to avoid enforcing arbitration contracts under the FAA's mandate. For instance, *Whisman* found, "it would be impossible to say that entering into a pre-dispute arbitration agreement was not covered," by the authority granted in the resident's power of attorney document. Pet. App. 39a. Nevertheless, the court did the "impossible" and refused to enforce the agent-entered predispute arbitration contract for reasons not applicable to any other type of contracts under Kentucky law. Pet. App. 42a. The court reasoned arbitration contracts waived a "God-given right" to jury trial and such waiver could not be inferred from a "less than explicit grant" of the power "to execute contracts" in general. Pet. App. 40a; 43a. *Whisman*'s result, holding the same grant of agency authority authorized enforcement of contracts – just not arbitration contracts – violates the FAA via the Supremacy Clause of the U.S. Constitution. State law simply cannot ignore the federal law's preemptive effect. *See, e.g.*, *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 & fn.12, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). Nor may Kentucky "opt out" of the Supremacy Clause: "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." *Marmet Health*, 132 S. Ct. 1201, 1202.

Amici, as long-term care providers in today's society, frequently find themselves under an increasing onslaught of legal, political and policy maneuvers designed and determined to eliminate predispute arbitration as a favorable option to courtroom litigation.

The Supreme Court of Kentucky's latest judicial policy-making effort is only one of several hurdles presented to *Amici* as efforts to block their right to contract freely for arbitration grow. Attorneys general, state senators, the Centers for Medicare & Medicaid Services, an aggressive plaintiff's bar – to name only a few – take all steps available designed to avoid the FAA's application and enforcement. In Kentucky especially, *Amici*'s right to contract for arbitration lacks the protection Congress intended by enacting the FAA.

Venue should play no part in substantive law, but it means everything in Kentucky after *Extendicare Homes, Inc. v. Whisman*. In *Whisman*'s wake, Kentucky is left with the new reality of a modern day "race to the courthouse." Kentucky parties to arbitration agreements must "race to the courthouse" to achieve their desired result. For parties seeking to avoid the enforcement of arbitration agreements, the preferred venue is Kentucky state courthouses. Kentucky's federal district courts provide the alternative for those hoping to enforce them. Unfortunately, Kentucky citizens lacking diversity to remove, or the ability to file an original federal action, often lose their right to enforce valid arbitration contracts.

The *Whisman* court attempted to disguise its ruling as an application of state contract law. In essence, the court determined the FAA need not be invoked if it defines state agency law to prevent contract formation in the first place. This Court must prohibit the

Kentucky court's flagrant end-around the FAA and reverse *Whisman*.

ARGUMENT IN SUPPORT OF THE PETITIONERS

The Supremacy Clause forbids state courts from dissociating themselves from federal law they do not like. *Cf., DirecTV, Inc. v. Imburgia*, 577 U.S. ___, 136 S. Ct. 463, 468, 193 L. Ed. 2d 365 (2015). "[T]he Judges of every State shall be bound" by "the Laws of the United States." U.S. CONSTITUTION, Art. VI, cl.2. Unrepentantly, the Supreme Court of Kentucky "rejected the notion" that its tortured holding conflicted with this Court's decisions in *Marmet Health*, 132 S. Ct. 1201, and *Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, on grounds that "our holding does not prohibit arbitration of any 'particular type of claim.'" Pet. App. 46a. *Whisman*'s overt rejection of federal substantive arbitration law deserves no deference and must be overturned. Kentucky state courts must not be permitted to carve exceptions into the FAA's preemptive mandate.

Whisman's decision, expressly denying that an agent's unrestricted "power to contract" for her principal *inherently* provides the authority to contract "for arbitration," overtly violates the FAA and conflicts with this Court's arbitration precedents and numerous federal district courts' holdings. *Whisman*'s aftermath leaves a significant jurisprudential divide between Kentucky's state and federal trial courts. *Amici* support

Petitioners' arguments explaining why *Whisman* violates the FAA and federal substantive arbitration law and must be reversed. *Amici* write separately to provide their perspective on these pressing circumstances.

I. *WHISMAN*'S RESTRICTIONS ON ARBITRATION RIGHTS POSE A SUBSTANTIAL THREAT TO THE ENTIRE LONG-TERM CARE INDUSTRY.

Enveloping uncertainty predominates as *Whisman*'s legacy. A significant number of long-term care residents, because of age, infirmity, or good estate planning principles utilize powers of attorney designating individuals authorized to conduct their business and personal affairs, including the right to enter into all types of contracts related to their principals' residencies at healthcare facilities. The Federal Arbitration Act ("FAA") requires arbitration contracts be enforced like all other contracts. *Whisman* carves an exception to that mandate by elevating the standard for enforcement of agent-executed arbitration contracts beyond that required for enforcement of any other agent-executed contract. *Whisman*'s standard exacerbates the progressively inordinate hardships encountered by long-term care entities seeking enforcement of their federal arbitration rights.

A. Nursing Home Arbitration Agreements Benefit All Parties Involved in Claims

Congress enacted the Federal Arbitration Act because it recognized arbitration to be an effective and economical alternative to litigation. Arbitration discovery is typically narrowed to the core of the dispute, and arbitration usually proceeds much more quickly than traditional litigation, which is subject to trial docket delays. By contrast, particularly in Kentucky, trial litigation is frequently encumbered by overly broad discovery virtually unlimited in scope or relevancy, resulting in extreme costs and lengthy delays. Most importantly, arbitration neither limits the types of claims that can be asserted nor the recoveries or damages available; it merely provides an alternative forum for resolution of the parties' dispute. *See American Health Care Association Special Study on Arbitration in the Long Term Care Industry*, AON Global Risk Consultants, June 16, 2009, p.5.

Public policy also supports the use of long-term care arbitration agreements. In *Amici*'s experience, most long-term care litigation cases resolve through settlement. When compared to traditional litigation in Kentucky, *Amici* find arbitration is more efficient, less adversarial, and reduces time to settlement.

This Court previously noted, "arbitration's advantages often would seem helpful to individuals, . . . who need a less expensive alternative to litigation." *Allied-Bruce Terminix Co. v. Dobson*, 13 U.S. 265, 280 (1995). In accord with *Amici*'s position, the *Dobson* Court

continued, "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . ." *Id.*

Respondent/Appellee posits that the Court should uphold *Whisman*'s result, contrary to existing federal law, allowing predispute arbitration agreements executed by agents (and especially in the long term care industry) to be enforced under a separate standard from all other contracts. This notion is at odds with Kentucky residents' constitutionally-protected right to contract for arbitration, as well as the fundamental right to contract protected by the Due Process Clause of the Fourteenth Amendment. *See* Kentucky Constitution Section 250 ("It shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment"). *See also*, U.S. CONST. AMEND. XIV, § 1. This Court has long recognized the general right of an individual to contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment. *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897).

Arbitration has been proven to reduce costs vastly, as well as enable patients and their families to retain a greater proportion of any settlement than with

traditional litigation contingency fee contracts. Kentucky has the highest loss rate (annual amount per occupied bed required to defend, settle or litigate claims in a year) of the states profiled in AON's *2015 General Liability and Professional Liability Actuarial Analysis*. Although AON reported the average projected 2016 loss rate to be $2,150 per bed, in Kentucky that number skyrockets to $9,820 per bed and is projected to grow by 5.0% annually.[4] This means that less than half of the dollars spent on liability is actually going to the patients and their families. *Id.* at 30-31. Therefore, decreased arbitration costs mean more of the award goes to the patient or resident, not his/her legal representative.

Kentucky ranks at or near the bottom in all categories concerning claim severity, costs and loss rates. For instance, Kentucky's claim severity was the worst of all states surveyed in the AON 2015 study and has averaged above $340,000 per claim since 2008, reaching as high as $401,000 per claim in 2015. *Id.* at p.31. Another AON study concluded that, as compared to traditional litigation, average long-term care provider expenses for claims arbitrated are 41% lower than those litigated. Moreover, arbitration challenges result in the highest associated expense: claims resolved after the court holds the arbitration agreement

---

[4] Long Term Care – *2015 General Liability and Professional Liability Actuarial Analysis*, AON Global Risk Consulting, p.4, available online at: https://www.ahcancal.org/research_data/liability/Documents/2015%20General%20Liability%20and%20Professional%20Liability%20Actuarial%20Analysis%20Report.pdf.

unenforceable have much higher total costs than those resolved following enforcement of the arbitration agreement. *See American Health Care Association Special Study on Arbitration in the Long Term Care Industry*, AON Global Risk Consultants, June 16, 2009, p.4.[5]

Claims subject to arbitration settle three months sooner. *See* AON's 2015 *General Liability Analysis*, at p.2. Claim frequency increases by 2% each year. *Id.* *Amici* support use of arbitration as a dispute resolution tool to counter the highly aggressive litigation climate facing long-term care facilities today. However, changing political climates, healthcare reform uncertainties and aggressive campaigns from the plaintiff's bar continue to provide major obstacles for Kentucky providers' ever-dwindling arbitration options. Recently, on October 4, 2016, the Centers for Medicare & Medicaid Services ("CMS") promulgated a rule, actively advocated by several members of Congress as well as several states' Attorneys General, asking CMS to ban predispute arbitration agreements in the long-term care setting, resulting in precisely that action. *See* Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; Arbitration Rule, 81 Fed. Reg. 68,688 (Oct. 4, 2016).[6]

---

[5] Available online at: https://www.ahcancal.org/research_data/liability/Documents/2009%20Special%20Study%20on%20Arbitration%20in%20Long%20Term%20Care.pdf.

[6] *See* footnote 10, *infra*.

Even ten years ago, a federal government review of long-term care liability issues concluded:

> At the root of this policy issue are the views and perceptions of the American public. In negotiating settlements, plaintiffs and defendants make decisions about compensation for damages based upon their shared judgments of what juries would decide if cases were to go to trial. Most every person interviewed during this study, whether they were associated with the plaintiff side or the defendant side of the issue, agreed that **the decisions of juries in nursing home negligence cases are virtually impossible to predict**.

Recent Trends in the Nursing Home Liability Insurance Market, U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, June 2006.[7] Regardless, the long-term care industry is a highly regulated industry, subject to government inspections, licensing, and ratings, among other compliance mandates. This regulation, not capricious litigation results, deters substandard care and provides quality care incentives. *See, e.g.*, 42 CFR Part 483, Subpart B – Requirements for Long Term Care Facilities.

Finally, state and federal taxpayers actually bear the cost of long-term care litigation and concomitant rising liability insurance expenses because long-term care is overwhelmingly reimbursed by Medicare and

---

[7] Available online at: http://Aspe.Hhs.Gov/Daltcp/Reports/2006/Nhliab.pdf.

Medicaid. In Kentucky, the loss rates as a percentage of Medicaid reimbursement amounted to 14.66% in 2015, again the highest among the states profiled. *See AON 2015 Long Term Care Liability Study*, p.31. Therefore, in the best interests of Kentucky's citizens as well as its long-term care providers, the Court should reverse *Whisman* to preserve arbitration as a fair, efficient and economically sound alternative for Kentucky long-term care providers and their residents alike.

B. *Whisman* Results in Uncertainty in Kentucky Law

Petitioners and the *Amici* belong to a highly-regulated industry. Provider facilities rely daily upon identifiable factors to operate while anticipating a multitude of contingencies. Long-term care entities provide protection, housing, medical treatment, therapy, companion services, nutritional fulfillment, counseling and numerous other services to their residents daily. *Amici* must be able to rely on their abilities to plan, budget and prepare for a myriad of scenarios, including litigation and insurance costs. As an industry, *Amici* count on their ability and right to contract, to include contracts for arbitral resolution of claims. As shown above, the anti-arbitration climate makes planning and preparing increasingly uncertain and difficult.

Pre-*Whisman*, long-term care providers in Kentucky could identify the number of residents admitted by agents under powers of attorney, who also agreed to arbitration for any potential claims. Kentucky established durable general powers of attorney by statute

and recognized the authority authorized therein. *See* KRS § 386.093. Courts enforced those grants of authority. *See, e.g., Kindred Healthcare, Inc. v. Cherolis*, 2013 WL 5583587 (Ky. App. Oct. 11, 2013), *vacated on remand* from the Kentucky Supreme Court in light of *Whisman, by Kindred Healthcare, Inc. v. Cherolis*, 2016 WL 6134910 (Ky. App. Oct. 21, 2016). Pre-*Whisman* status quo provided *Amici* a respectable level of certainty for business tracking, planning and budgeting.

However, post-*Whisman*, regardless of the express grant of authority given by the principal therein, an agent acting under a written power of attorney no longer affords certain authority. The determination as to whether a Kentucky court will enforce the arbitration agreement now, in fact, depends almost entirely on whether the case is filed in federal or state court. *See, e.g., Preferred Care of Delaware, Inc. v. Crocker*, 173 F. Supp. 3d 505, 521 (W.D. Ky. 2016) (currently on appeal in Sixth Circuit Court of Appeals, Case No. 16-6179) (Ms. Crocker filed personal injury claim in state court; Preferred Care sought to enforce arbitration contract and compel arbitration in federal court. State court ruled first, holding ADR contract unenforceable in accordance with *Whisman*, and federal district court's subsequent finding of enforceable ADR contract later held barred by *res judicata* principles). *See* Section III, *infra*, for additional discussion.

Whisman severely restricted the *Amici*'s ability to contract as an industry. *Amici* and residents voluntarily enter into thousands of predispute arbitration agreements every year, many executed by attorneys-in-fact on the resident's behalf like the underlying

cases here. Predispute arbitration agreements represent efficient, cost-effective alternatives to traditional civil litigation, vital to *Amici* and the entire long-term care industry. Arbitration, both because it is quicker and procedurally simpler, reduces transaction expenses retaining more resources for resident care and claim resolution. *Amici* typically present residents with arbitration agreements upon admission. Some are standalone agreements; some form part of the admissions agreement.

Pursuant to the Supremacy Clause of the U.S. Constitution, the FAA is the law in all states – not "all states *except* Kentucky." Nevertheless, the *Whisman* court refused to apply the FAA's body of federal substantive law and specifically rejected the FAA as not applicable to the facts presented. Given its stated reasoning, it appears the *Whisman* court would have found Ms. Clark's attorney-in-fact had power to bind Ms. Clark to any *other* contract – just not an arbitration contract. Pet. App. 39a-40a. Stated otherwise, the *Whisman* court did not consider, as it claimed, the agent's "authority to form any contract," but instead heightened the conditions under which it vowed to enforce *arbitration* contracts, only, by defining heightened standards to be applied when the contract involves arbitration. Pet. App. 42a-44a.

The *Whisman* court's interpretation of the FAA and its application to this matter holds ramifications far beyond this case. The state court's holding, if allowed to stand, will continue to generate disparate results, especially as between state and federal courts, create uncertainty, irreparable harm and confusion

within the realm of general public interest. Individuals and businesses alike will be unable to rely upon their constitutionally-protected right to contract for arbitration in both commercial and private contexts. Contracts previously made in good faith under prevailing laws will be subject to immediate invalidation. *Amici* are aware of multiple cases currently on appeal in Kentucky's courts concerning the interpretation and enforcement of arbitration contracts executed under powers of attorney.

Additionally, *Whisman*'s holding poses a substantial threat to the long-term care industry at a time when demographic trends dictate that the provision of long-term care will become increasingly important. Because of rapid healthcare improvements, the United States is an ageing society. The need for long-term care increases daily as our population lives longer. Between 2000 and 2050, the number of older people is projected to increase by 135%. Moreover, the population aged 85 and over, which is the group most likely to need health and long-term care services, is projected to increase by 350%. Over this time period, the proportion of the population that is over the age of 65 will increase from 12.7% in 2000 to 20.3% in 2050; the proportion of the population that is age 85 and older will increase from 1.6% in 2000 to 4.8% in 2050. *See Population Ageing in the United States of America: Implications for Public Programmes*, Oxford International Journal of Epidemiology, 2002, Vol. 31, Issue 4, pp.776-781.[8] As the U.S. population ages, the long-term care industry will play

[8] Available online at: http://ije.oxfordjournals.org/content/31/4/776.full.

a prominent role in providing healthcare to the nation's elderly.[9] It is virtually undisputed that the future well-being of the country's aging population depends on a strong long-term care industry.

In addition to undue litigation burdens hindering its ability to enforce its federal arbitration rights, the nation's long-term care industry faces a number of other challenges which threaten it, including economic, governmental, and regulatory pressures. As discussed, in 2016, the Centers for Medicare & Medicaid Services proposed a rule to prohibit predispute arbitration contracts in long-term care settings. *See* Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; Arbitration Rule, 81 Fed. Reg. 68,688 (Oct. 4, 2016).[10] Moreover, skilled nursing

---

[9] The population age 65 and over has increased from 36.2 million in 2004 to 46.2 million in 2014 (a 28% increase) and is projected to more than double to 98 million in 2060. By 2040, there will be about 82.3 million older persons, twice the number in 2000. People 65+ represented 14.5% of the population in the year 2014, but are expected to grow to 21.7% of the population by 2040. The 85+ population is projected to triple from 6.2 million in 2014 to 14.6 million in 2040. *See* U.S. Dep't of Health & Human Servs., Admin, on Aging, *Aging Statistics* (updated through 2015), available online at: http://www.aoa.gov/aoaroot/aging_statistics/index.aspx.

[10] Although the U.S. District Court for Northern District of Mississippi temporarily enjoined CMS from enforcing a rule that bans predispute arbitration contracts and facially violates the FAA, the matter is not yet resolved and will continue to percolate through the courts, providing still more proof of ongoing arbitration hostility. *See American Health Care Association et al. v. Burwell*, Case 3:16-cv-00233-MPM-RP, Doc. 44, PageID#: 8583-8622.

facilities face a cumulative Medicare funding reduction worth $65 billion over the next six years.[11]

The long-term care industry cannot seek legislative protection against this onslaught in states like Kentucky, Illinois, Arkansas, and Georgia, where state constitutional doctrines exist and defeat all efforts at tort reform legislation aimed at deterring the filing of meritless claims and providing incentives for meritorous claims. *See Williams v. Wilson*, 972 S.W.2d 260, 267 (Ky. 1998); *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, 385 S.W.3d 822 (2011); *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 220 (Ga. 2010). Courts should encourage efficient dispute resolution in long-term care settings. *Amici* join the Petitioners in asking this Court to reverse *Whisman*.

II. THE KENTUCKY COURT'S DECISION IN *WHISMAN* CONSTITUTES THE STATE'S LATEST ATTEMPT TO EVADE *CONCEPCION* AND THE FAA.

The Kentucky court attempted to evade FAA preemption, this time under the guise of state law contract formation. This latest result procreates "the judicial hostility towards arbitration that prompted the FAA [which has] manifested itself in 'a great variety' of

---

[11] *$65 billion in Medicare cuts to rock U.S. nursing homes over 10 years, analysis shows*, McKnight's Long-Term Care News (Aug. 2, 2012), available online at: http://www.mcknights.com/65-billion-in-medicare-cuts-to-rock-us-nursing-homes-over-10-years-analysis-shows/article/253036.

'devices and formulas' declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747.

Concepcion explained how Congress carefully tempered the FAA's mandate to respect parties' freedom of contract by including in the FAA a saving clause that preserves generally applicable contract defenses from preemption. *Id.* at 1748. But even a defense that a state court characterizes as generally applicable to all contracts, as does the *Whisman* court, is preempted by the FAA if the defense "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1747-48. This is the main reason why *Whisman* cannot stand.

When a contract defense nominally considered to be arbitration-neutral disproportionately invalidates arbitration agreements, that defense offends the FAA's objectives and is preempted. *See id.* Even prior to *Whisman*, Kentucky's highest court historically resisted *Concepcion* in less obvious, but no less troubling, ways. For example, in 2012, the Kentucky Supreme Court rendered *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012). *Ping* severely limited (and quite possibly confused) Kentucky law of agency concerning specific versus general powers of attorney to reach its desired result. *Ping* re-characterized a general durable power of attorney containing broad, general grants of authority from the principal as one granting powers specifically over healthcare, business and finances. *Id.* at 588-89. Working within this now-narrowed frame, *Ping* refused to hold that a POA granting limited powers could be interpreted to allow the attorney-in-fact to

sign an optional predispute arbitration agreement on her principal's behalf when not required for the long-term care admission. *Id.* at 592. The Kentucky court even then asserted its "authority" to denounce the FAA as enforceable subject to contrary state law, repudiating this Court's precedent. *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 489-90, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 16 & fn.11, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). *Ping* exposed the Supreme Court of Kentucky's unbridled bias and hostility towards arbitration. *Whisman* confirmed its continued, jurisprudential prevalence. Interestingly, *Ping*'s author dissented from the *Whisman* majority and stated that *Whisman* did not follow *Ping*'s limitation and interpretations applying to agency law, but rather extended it in a manner violating the FAA. *See Whisman*, Pet. App. 69a-74a (Abramson, J., dissenting.).

The *Whisman* court noted the FAA was implicated only *if* a contract was formed between the parties. Pet. App. 24a. Although the state court acknowledged the principals empowered their agents with express authority "to sign contracts," the court held this grant of power insufficient to create an *arbitration* contract, in particular, because arbitration contracts carry implications beyond those of other contracts. Pet. App. 42a. *Whisman* thus elevated the standard for enforcing arbitration contracts by requiring something different

from other contracts. *Id.* In doing so, the court purported to rely on state law contract and agency principles (e.g., requirements for contract formation with agents) and overtly rejected contrary holdings of this Court and federal courts. *See* Pet. App. 24a-48a; *but see Concepcion*, 563 U.S. at 352 (if an otherwise neutral contract defense "stand[s] as an obstacle to the accomplishment of the FAA's objectives," the FAA preempts it) (*citing Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).

In particular, the *Whisman* court "rejected the notion" that its tortured holding conflicted with this Court's decisions in *Marmet Health*, 132 S. Ct. 1201, and *Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, on grounds that "our holding does not prohibit arbitration of any 'particular type of claim.'" Pet. App. 46a. The Kentucky court appears to have misunderstood *Concepcion*'s test requires an additional level of analysis to pass muster. *See Concepcion*, 563 U.S. at 339 ("This [9 U.S.C. § 2] saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."). *Accord*, *Crocker*, 173 F. Supp. 3d 521 ("Though the second inquiry under *Concepcion* is "more complex," this Court believes that the Kentucky Supreme Court's decision in *Whisman* fails the second inquiry and, therefore, is invalid."). Otherwise, it brazenly disregarded this Court's precedent as "inapplicable," Pet. App. 24a, and confirms the

judicial hostility to arbitration the FAA originally sought to extinguish still thrives in Kentucky.

This Court should reverse and instruct the Kentucky court and other state courts to follow the Supremacy Clause and the policy of the FAA by enforcing arbitration agreements as written, even when this leads to a result at odds with state public policy, state unconscionability doctrines, or other principles of state law.

III. KENTUCKY'S FEDERAL DISTRICT COURTS UNANIMOUSLY DISAGREE WITH *WHISMAN*'S REASONING, RESULTING IN RACE TO COURTHOUSE.

Every U.S. District Court in Kentucky that has considered the application of *Whisman*'s reasoning/result has reached the conclusion that *Whisman*'s holding is invalid and its decision violates the FAA and Supremacy Clause, prohibits enforcement of valid arbitration contracts and cannot be enforced to that result.[12] Unfortunately, lower Kentucky state courts remain bound by Kentucky Supreme Court Rule to follow and apply *Whisman*. *See* SCR 1.030(8) (Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court), and SCR 1.040(5) (circuit and district courts

---

[12] *Amici* has found no Kentucky federal district court opinion that enforced *Whisman*'s rule or application. Rather, the U.S. District Courts in the Eastern and Western Districts of Kentucky have unanimously held *Whisman* is invalid.

are bound by and shall follow applicable precedents established in the opinions of the Supreme Court and Court of Appeals).

Venue should play no part in substantive law, but it means everything in Kentucky after *Extendicare Homes, Inc. v. Whisman*. In *Whisman*'s wake, Kentucky parties to arbitration agreements must now "race to the courthouse" – to avoid enforcement of an arbitration agreement, Kentucky state courthouses. Kentucky's federal district courts provide the alternative for those hoping to enforce arbitration contracts. Unfortunately, Kentucky citizens lacking diversity to remove or file an original federal action often lose their right to enforce valid arbitration contracts. *See, e.g.*, *Crocker*, 173 F. Supp. 3d 505 (on appeal in Sixth Circuit Court of Appeals, Case No. 16-6179) (Crocker filed personal injury claim in state court; Preferred Care sought to compel arbitration in federal court. State court ruled first, holding ADR contract unenforceable in accordance with *Whisman*, and federal district court's subsequent finding of enforceable ADR contract later held barred by *res judicata* principles).

Intrastate "conflicts undercut basic rule of law expectations. Allowing the content of national constitutional law to depend on . . . whether a case is filed in state or federal court is at odds with the core expectation of horizontal consistency in the law's content and application." Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME LAW REVIEW 235, 258, Appendix (2014) (*citing* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. LAW REVIEW 1243, 1249 (1999)). "The

Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual." *Truax v. Corrigan*, 257 U.S. 312, 338 (1921).

These U.S. District Courts in the Eastern and Western Districts of Kentucky found *Whisman* to be invalid: *GGNSC Louisville Hillcreek, LLC v. Watkins*, 2016 WL 815295 (W.D. Ky. Feb. 29, 2016); *Preferred Care of Delaware, Inc. v. Crocker*, 173 F. Supp. 3d 505 (W.D. Ky. 2016); *GGNSC Louisville Mt. Holly, LLC v. Leslie Guess Mohamed-Vall*, Case No. 3:16-cv-136-DJH (W.D. Ky. April 6, 2016); *Owensboro Health Facilities, L.P. v. Henderson*, 2016 WL 2853569 (W.D. Ky. May 13, 2016); *Riney v. GGNSC Louisville St. Matthews, LLC d/b/a Golden Living Center – St. Matthews*, 2016 WL 2853568 (W.D. Ky. May 13, 2016); *Brandenburg Health Facilities, LP v. Mattingly*, 2016 WL 3448733 (W.D. Ky. June 20, 2016); *Preferred Care of Delaware, Inc. v. Hopkins*, 2016 WL 3546407 (W.D. Ky. June 23, 2016); *Pine Tree Villa, Inc., LLC d/b/a Regis Woods v. Coulter*, 2016 WL 3030185 (W.D. Ky. May 25, 2016); *GGNSC Stanford, LLC v. Gilliam*, ___ F. Supp. 3d ___, 2016 WL 4700135 (E.D. Ky. Sept. 7, 2016); *Diversicare Highland, LLC v. Lee*, 2016 WL 3512256 (W.D. Ky. June 21, 2016).

In light of these recent opinions, this Court should also consider the very concerns Justice Abramson (now Hughes) expressed in her *Whisman* dissent.

> Unlike the majority's examples, all of which suppose the waiver or compromise of a basic, personal substantive right (rights that an ordinary attorney-in-fact is rarely, if ever, asked

> to address on the principal's behalf), arbitration agreements, which are commonplace these days, involve no substantive waiver. The principal's substantive rights remain intact, only the forum for addressing those rights is affected. The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive substantive rights) is the very presumption Congress sought to counteract with the FAA.
>
> Thus, while it may well be possible to frame a rule under state law to the effect that a presumption exists against an agent's authority to waive certain substantive rights of the principal, it does not follow that state law would include the right to civil trial among those presumptively non-waivable rights; and even if, as the majority would have it, the state rule did purport to hold sacrosanct the principal's right to trial in civil cases, under *Concepcion* and the FAA, the saving clause of which is not to be construed as a self-destruct mechanism, that aspect of the state rule would be preempted by federal law.

See Pet. App. 97a-98a (Abramson, J., dissenting).

While principals are free to discriminate against arbitration or certain types of contracts in their POA's, the FAA absolutely prohibits courts from doing what the principal did not do: *inferring* that discrimination. "Evidence" of discrimination against arbitration cannot arise from the POA's mere omission of certain "waiver" language when this Court has affirmed that

the right to jury trial can be waived, constitutionally, by similar omission. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 677 (1944).

Joe Wellner's Power of Attorney document granted his attorney-in-fact powers to "make, execute and deliver deeds, releases, conveyances and *contracts of every nature* in relation to both real and personal property, including stocks, bonds and insurance." Joint Appendix 10-11 (emphasis added). His POA contained additional grants to "demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor)." Joint App. 10. Likewise, Olive Clark's "General Durable Power of Attorney to Conduct All Business and Personal Affairs of Principal" granted her attorney-in-fact, "with full power for me and in my name . . . in her sole discretion" to "transact, handle, and dispose of all matters affecting me and/or my estate in any possible way." Joint App. 7. Her POA granted powers to "draw, make and sign in my name any and all checks, promissory notes, *contracts*, deeds or *agreements*." Joint App. 7 (emphasis added). Her POA also granted authority to "institute or defend suits concerning my property or rights," and "Generally to do and perform for me and in my name all that I might do if present." Pet. App. 19a. Either Mr. Wellner or Ms. Clark could have limited his or her agent's ability to enter into arbitration contracts, but neither

did. Both specifically empowered execution of "contracts" ("of every nature" and "any and all") without exception.

Kentucky's federal district courts agree. In *Watkins*, Judge Hale found *Whisman* inapplicable to the ultimate result but questioned the *Whisman* Majority Opinion's reasoning as not consistent with applicable federal law, *citing Whisman*, 478 S.W.3d at 354 (Hughes, J., dissenting) ("[A]s the United States Supreme Court has made absolutely clear, what state law cannot do directly – disfavor arbitration – it also cannot do indirectly by favoring arbitration's correlative opposite, a judicial trial. Since that is the express purpose of the rule the majority pronounces and since the application of that rule will clearly have a disproportionate effect on the ability of agents to enter arbitration agreements (as opposed to other contracts), the majority's new rule is plainly invalid."). *See Watkins*, 2016 WL 815295, at *5, at fn.3.

In *Crocker*, Judge Russell went a step further and held *Whisman* to be "invalid" as violative of the FAA:

> [T]his Court believes that the Kentucky Supreme Court's decision in *Whisman* fails the second inquiry [of *Concepcion*] and, therefore, is invalid. The rule established by Kentucky's highest court conflicts with the goals and policies of the FAA, as they are "antithetical to threshold limitations placed specifically and solely on arbitration." *Doctor's Associates* [*Inc. v. Casarotto*], 517 U.S. [681, 688 (1996)]. The

> Kentucky Supreme Court's requirement that a principal in his power of attorney explicitly convey to an attorney-in-fact the right to enter into a pre-dispute arbitration agreement "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity." *Id.* Consequently, the court's rule is "inconsonant with, and is therefore preempted by, the federal law." *Id.*

Crocker, 173 F. Supp. 3d at 521.

The *Mohamed-Vall* court also rejected *Whisman*: "The FAA's purpose . . . is 'to place arbitration agreements upon the same footing as other contracts.' [Citation omitted.] Accordingly, the Court will not apply *Whisman* to the extent that it conflicts with U.S. Supreme Court precedent by treating an agreement to arbitrate differently than any other contract." *Mohamed-Vall*, at p.9 of 14 (Page ID#: 347). And in both *Henderson* and *Riney*, Judge McKinley of the Western District of Kentucky adopted verbatim Judge Russell's reasoning in *Crocker*, finding *Whisman*'s holding "invalid." *See Henderson*, at pp.7-8 of 9 (Page ID#: 209-210); *Riney*, at pp.6-7 of 8 (Page ID#: 90-91). *Hopkins* and *Coulter* also join with *Crocker*'s reasoning. *See Hopkins*, 2016 WL 3546407, at *4; *Coulter*, 2016 WL 3030185, at *3. The Kentucky court's opinion moved Judge Stivers of the Western District of Kentucky to comment:

> Applying *Whisman* to invalidate the arbitration agreement signed by Decedent's husband would run afoul of the FAA. Although the

> Kentucky Supreme Court's antipathy for arbitration was more subtly expressed in its earlier decision in *Ping* [v. *Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012)], its true colors were revealed fully in *Whisman*. . . . [T]he rule expressed in *Whisman* contravenes the FAA[.]

Preferred Care of Delaware, Inc. v. Hopkins, 2016 WL 3546407 (W.D. Ky. June 23, 2016). *Whisman* was wrongly decided.

The *Whisman* court and Respondent erroneously posit the FAA is not implicated here because the parties never formed a contract under Kentucky's state law of agency. Yet, every Kentucky federal district court analyzing *Whisman*'s rule of law rejects that argument and agrees: *Whisman* targets *enforcement* of arbitration contracts, specifically, and flagrantly violates the FAA. Regardless of *Whisman*'s attempt to disguise its anti-arbitration ruling, Kentucky's federal district courts rightfully recognize that *Whisman*'s holding actually elevates enforcement standards for valid, agent-executed arbitration contracts, implicating and violating the FAA.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the judgment below must be reversed. *Whisman* is enormously detrimental to the

long-term care industry, particularly if its reasoning spreads beyond Kentucky to other states.

Respectfully submitted,

DONALD L. MILLER, II
*Counsel of Record
KRISTIN M. LOMOND
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
9300 Shelbyville Road, Suite 400
Louisville, KY 40222
(502) 423-6390
dmiller@qpwblaw.com
klomond@qpwblaw.com
Counsel for Amici Curiae

No. 16-32

IN THE

Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, *ET AL.*,

Petitioners,

v.

JANIS E. CLARK, *ET AL.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

January 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Kentucky court applied ordinary principles of contract law in determining that whether nursing-home arbitration agreements are validly formed depends on whether the agents who executed them had authority to do so. 3

II. The FAA does not impliedly preempt the court's application of Kentucky agency-law principles to determine the scope of authority conferred by powers of attorney. 8

A. Kindred's argument depends on principles of implied obstacle preemption. 8

B. General Kentucky agency principles pose no obstacle to achievement of the FAA's objectives. 9

C. The Kentucky court's application of agency principles to the powers of attorney in this case creates no obstacles to the FAA's purposes. 10

1. The state court's holding with respect to Wellner's power of attorney reflected its reasonable interpretation of the document's language 11

2. The Kentucky court's interpretation of the Clark power of attorney is fully consistent with the FAA's fundamental policy that arbitration is a matter of consent..... 12

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: **Page(s)**

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009) 15, 16

Altria Group, Inc. v. Good,
555 U.S. 70 (2008) 9

Am. Health Care Ass'n v. Burwell,
2016 WL 6585295 (N.D. Miss. Nov. 7, 2016),
appeal pending, No. 17-60005 (5th Cir.) 5

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 3, 4

Button v. Drake,
195 S.W.2d 66 (Ky. Ct. App. 1946) 12

Chamber of Commerce of U.S. v. Whiting,
563 U.S. 582 (2011) 9

DIRECTV, Inc. v. Imburgia,
136 S. Ct. 463 (2015) 4

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 3, 7, 16, 17

Granite Rock Co. v. Int'l B'hood of Teamsters,
561 U.S. 287 (2010) 3, 7, 14

Hines v. Davidowitz,
312 U.S. 52 (1941) 8

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 16

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 9

Marmet Health Care Ctr., Inc. v. Brown,
132 S. Ct. 1201 (2012) 6

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 3

Ping v. Beverly Enters., Inc.,
376 S.W.3d 581 (Ky. 2012) 9, 10

Rent-A-Center, West, Inc. v. Jackson,
561 U.S. 63 (2010) 16

Rodriguez v. United States,
480 U.S. 522 (1987) 16

Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468 (1989) 3, 13, 15

Wright v. Universal Maritime Serv. Corp.,
525 U.S. 70 (1998) 15, 16, 17

Wyeth v. Levine,
555 U.S. 555 (2009) 9, 17

Statutes:

9 U.S.C. § 2 ..... 3, 14

Other:

Am. Arbitration Ass'n, *Healthcare Policy Statement* (2003), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_011014 5

Am. Bar Ass'n, Comm'n on Law & Aging, *Policy on LTC Facility Arbitration Agreements 111B* (Feb. 16, 2009), http://www.americanbar.org/content/dam/aba/directories/policy/2009_my_111b.authcheckdam.pdf 5

Dep't of Health & Human Servs., *Final Rule: Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68688 (Oct. 4, 2016) 4, 5

Restatement (Third) of Agency § 2.02 & comment h 13

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory predispute arbitration agreements, and its attorneys have represented parties and amici curiae in many cases involving such issues in this Court and other federal and state courts.

SUMMARY OF ARGUMENT

Predispute arbitration agreements between nursing homes and other long-term care facilities and their patients, entered into at the time of a patient's admission to a facility, have proliferated and become subjects of controversy in recent years. Although some critics of those agreements, including the Centers for Medicare and Medicaid Services (CMS) of the United States Department of Health and Human Services, have objected to them on policy grounds, the Kentucky Supreme Court in this case expressed no such policy preference. As required by the Federal Arbitration Act (FAA), the court recognized that an arbitration agreement between a nursing home and a resident, if properly formed under state law, is valid and enforceable unless there is a generally applicable contract-law basis for setting it aside.

---

[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Letters of consent to its filing from counsel for all parties are on file with the Clerk.

In this case, the question whether the arbitration agreements at issue were validly formed turned on an antecedent issue of Kentucky agency law—whether the powers of attorney under which the patients' representatives acted when executing the claimed arbitration agreements authorized entry into such agreements. To answer that question, the Kentucky Supreme Court applied Kentucky agency-law principles limiting an agent's powers to those expressly conferred in a power of attorney, read in light of the agent's good-faith obligation to conform to a reasonable understanding of the principal's intentions. Based on those principles, the court held that the powers of attorney in this case did not confer authority to enter into predispute arbitration agreements.

Although the FAA does not, by its terms, address the scope of agents' authority to enter into contracts, petitioners Kindred Nursing Centers, *et al.*, argue that the Kentucky court's application of agency principles in this case is impliedly preempted by the FAA because the court's ruling stands as an obstacle to the fulfillment of the FAA's objectives. Kindred does not carry the heavy burden of demonstrating such preemption. The Kentucky court's attempt to determine the reasonable scope of the authority granted under the powers of attorney at issue presents no barrier to the FAA's core objective of fostering enforcement of arbitration agreements consensually entered into by both parties. Rather, the court's application of agency principles reinforces the FAA's central purposes by ensuring that arbitration agreements genuinely reflect the assent of those against whom they are enforced.

ARGUMENT

I. The Kentucky court applied ordinary principles of contract law in determining that whether nursing-home arbitration agreements are validly formed depends on whether the agents who executed them had authority to do so.

The FAA provides that written agreements to arbitrate disputes are enforceable, subject to legal principles that govern enforcement of other contracts. 9 U.S.C. § 2; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Although the Court has characterized the FAA as embodying a "liberal federal policy favoring arbitration," *id.* (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), that policy encompasses only arbitration contractually agreed to by the parties. *See Granite Rock Co. v. Int'l B'hood of Teamsters*, 561 U.S. 287, 299 (2010). Thus, the "first principle" of federal law under the FAA is not that arbitration is favored, but that "[a]rbitration is strictly 'a matter of consent,' and thus 'is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration.'" *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis added in *Granite Rock*)).

The FAA does not itself supply standards determining whether there is a valid agreement to arbitrate between two parties. Rather, that issue is generally determined in the first instance by state-law principles that govern how contracts are formed, whom they bind, how they are interpreted, and what defenses may exist to their enforcement. *See, e.g.*, *Concepcion*, 563 U.S. at 339–40; *First Options*, 514 U.S. at 944; *Volt*, 484 U.S. at 474,

484. This Court has held, however, that state contract-law principles are preempted by the FAA if they "prohibit[] outright the arbitration of a particular type of claim" or are "applied in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341; *see, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469–71 (2015).[2]

Application of state-law contract principles to predispute arbitration agreements allegedly entered into when a patient is admitted to a long-term care facility or nursing home often poses difficult questions of unconscionability under state law. The circumstances under which such agreements are signed by patients or their representatives, who are often family members, make informed, voluntary decisions particularly unlikely. Such agreements are typically entered into "when the would-be resident is physically and possibly mentally impaired, and is encountering such a facility for the first time." Dep't of Health & Human Servs., *Final Rule: Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68688, 68792 (Oct. 4, 2016). Admission to such a facility inevitably comes at "an extremely stressful time for the residents and their families," *id.* at 68793, and in circumstances in which "there is unequal bargaining power between the residents and their representatives and the facilities." *Id.* at 68797. "The resident's immediate need for nursing care and lack of experience with arbitration means that

---

[2] Disagreement remains on the Court as to whether the Act applies to state-court proceedings or has preemptive effect with respect to principles of contract law applied in such proceedings. *See Imburgia*, 136 S. Ct. at 472 (Thomas, J., dissenting). Under the view that "the FAA does not require state courts to order arbitration," *id.*, the Kentucky Supreme Court's holding that the FAA does not require arbitration of this case would have to be affirmed.

residents are unlikely to ask for time to seek legal advice concerning the agreement for binding arbitration." *Id.* As a result, "meaningful or informed consent for pre-dispute arbitration is often lacking." *Id.* at 68796.

These considerations recently led CMS, the federal agency responsible for oversight of the Medicare and Medicaid programs that fund care at many nursing homes, to conclude that, when entered into at the time of admission of a patient to a long-term care facility, "pre-dispute arbitration clauses are, by their very nature, unconscionable" because "it is virtually impossible for a resident or their surrogate decision-maker to give fully informed or voluntary consent to such arbitration provisions." *Id.* at 68972. In line with recommendations of the American Bar Association and a policy adopted by the American Arbitration Association against the use of pre-dispute arbitration agreements in such settings, CMS accordingly issued a rule prohibiting the use of predispute arbitration agreements by long-term care facilities that receive Medicaid or Medicare funding.[3] Although the CMS rule has been challenged in court, the challenge centers more on the extent of CMS's authority than on the validity of its factual findings and conclusions.[4]

---

[3] *See* Am. Bar Ass'n, Comm'n on Law & Aging, *Policy on LTC Facility Arbitration Agreements 111B* (Feb. 16, 2009), http://www.americanbar.org/content/dam/aba/directories/policy/2009_my_111b.authcheckdam.pdf; Am. Arbitration Ass'n, *Healthcare Policy Statement* (2003), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_011014.

[4] A federal district court preliminarily enjoined the CMS rule on November 7, 2016, and CMS has appealed. *See Am. Health Care Ass'n v. Burwell*, 2016 WL 6585295 (N.D. Miss.), *appeal pending*, No. 17-60005 (5th Cir.).

Whatever authority CMS may have to issue such a rule, this Court's FAA preemption rulings hold that a state court cannot categorically deny enforcement to agreements to arbitrate particular types of disputes, such as those between patients and nursing homes, but must consider their enforceability based on general contract-law principles, such as unconscionability. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012). In this case, the Kentucky Supreme Court recognized exactly that: It held that a validly formed predispute arbitration agreement between a nursing-home resident and a nursing home is "enforceable as written under both the Kentucky Uniform Arbitration Act (KUAA) ... and the Federal Arbitration Act (FAA) ... with respect to the decedents' claims for personal injury and statutory violations." Pet. App. 24a. The court further held—likewise in accordance with the FAA's first principle of consent—that the agreements could be enforced only if they were validly formed under Kentucky law, because "[u]nless an arbitration agreement was validly formed, there is no arbitration agreement to be enforced." *Id.* at 25a.

The presence of significant contract formation issues in this case stems from a characteristic of nursing-home admissions that is distinct from the circumstances in most settings where corporations seek to bind consumers or workers to predispute arbitration agreements: Nursing-home arbitration agreements are often entered into not by the individual subject to them, but by a representative acting pursuant to a power of attorney or other authorization because of the individual's own diminished capacity. In the cases here, for example, the claimed arbitration agreements were signed by relatives of the now-deceased nursing home residents as attor-

neys-in-fact under powers of attorney previously executed by the decedents.

In such a situation, application of "ordinary state-law principles that govern the formation of contracts" to determine "whether the parties agreed to arbitrate," *First Options*, 514 U.S. at 944, requires consideration of whether the person executing the contract had authority to bind the principal under state law.[5] The Kentucky Supreme Court here followed exactly that approach, holding that the contracts would be enforceable if the principals conferred authority to sign such agreements under the powers of attorney at issue, but would not be enforceable if the powers of attorney did not confer such authority. That holding, as this Court's decisions require, reflected the generally applicable principles of contract law that a person's assent is required for the enforcement of any contract, and that assent may be provided by an agent acting within the scope of authority conferred by a principal.

---

[5] A separate issue sometimes arises in the nursing-home context when a care provider asserts that plaintiffs who are not parties to an arbitration agreement are bound by it when they assert wrongful-death claims. The Kentucky court's resolution of that separate question in this case, which is not challenged in this Court, is based on the principles that, under Kentucky law, wrongful death claims belong to survivors, not to the decedent, and that the survivors are not parties to the claimed arbitration agreement between the decedent and the nursing home. Pet. App. 8a–11a. That decision is fully consistent with the fundamental FAA principle that parties are bound to arbitrate only those issues that *they* have agreed to arbitrate. *Granite Rock*, 561 U.S. at 299.

II. The FAA does not impliedly preempt the court's application of Kentucky agency-law principles to determine the scope of authority conferred by powers of attorney.

The state court analyzed the question whether the powers of attorney at issue conveyed authority to agree to binding predispute arbitration agreements under principles of Kentucky agency law, under which the scope of an attorney-in-fact's authority depends on the powers expressly set forth in a written power-of-attorney instrument. Kindred argues that the FAA preempts the Kentucky court's application of this agency-law principle to the particular facts here because the court read the powers of attorney at issue in a way that disfavored arbitration. Kindred has not carried its burden of demonstrating preemption on such a theory.

A. Kindred's argument depends on principles of implied obstacle preemption.

The FAA clearly does not *expressly* preempt a state court's construction of a power of attorney to determine whether or not it authorizes an agent to assent to arbitration on a principal's behalf, nor can there be a direct conflict between the FAA's terms and a decision concerning scope of agency. By its express terms, the FAA requires only that contracts to arbitrate be enforced, and says nothing about antecedent determinations of agency authority that affect whether any contract binding a particular person has been entered into. At most, Kindred's argument is that the FAA *impliedly* preempts principles of state agency law that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Such claims, however, "do[] not justify a 'freewheeling judicial inquiry into whether a state [law] is in tension with federal objectives.'" *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (citation omitted). Indeed, at least one member of this Court has questioned whether such implied preemption analysis comports with our constitutional structure. *See Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment). In any event, any consideration of implied preemption requires particular caution when the subject is a field of "traditional state regulation." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001)). Without question, agency law is such a field.

B. General Kentucky agency principles pose no obstacle to achievement of the FAA's objectives.

Kindred does not contend that the general principle of agency law applied here by the Kentucky Supreme Court—that an agent's authority under a power of attorney must be declared expressly, and that authority to enter into any particular type of transaction must be construed by reference to the types of transactions expressly authorized as well as the agent's duty to act in good faith—is preempted. That principle by itself poses no obstacle to the purposes and objectives of the FAA, let alone a sufficient obstacle to demonstrate a "clear and manifest purpose of Congress" to supersede it. *Altria*, 555 U.S. at 77.

Similarly, Kindred does not argue that the Kentucky court's application of that basic agency-law principle in its prior decision in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), reflected hostility to arbitration or posed an obstacle to achievement of the FAA's

purposes. Nor could Kindred plausibly make any such assertion: *Ping* held that a power of attorney that expressly conferred authority with respect to medical care decisions, financial matters involving the receipt and expenditure of funds, and real estate transactions did not confer authority to enter into a predispute arbitration agreement that did not fall within the scope of any of those three areas of authority. That holding involves no hostility toward or discrimination against arbitration and poses no barrier to the formation of consensual arbitration agreements. *Ping* rests on the neutral principle that the language of a power of attorney must be such that the agent "reasonably could have understood her authority under the power of attorney" to extend to the subject-matter of a particular transaction or contract entered into on the principal's behalf. *Id.* at 592.

C. The Kentucky court's application of agency principles to the powers of attorney in this case creates no obstacles to the FAA's purposes.

Kindred's attempt to portray the Kentucky Supreme Court's application of the fundamental principles of Kentucky agency law in this case as somehow different from the application of those principles in *Ping*, and as imposing a true obstacle to fulfillment of the FAA's purposes, is unpersuasive. Here, as in *Ping*, the court reasonably construed the language of the powers of attorney, and that construction is consistent with the fundamental FAA policy that arbitration is a matter of consent.

1. The state court's holding with respect to Wellner's power of attorney reflected its reasonable interpretation of the document's language.

According to Kindred, the Kentucky court's holding rested entirely on an "explicit-reference rule" under which arbitration agreements, alone among the kinds of contracts an agent might enter into, will be considered unauthorized unless a power of attorney specifically authorizes them. *See* Kindred Br. 17. Kindred's argument elides differences between the language of the two powers of attorney at issue here. The Wellner power of attorney specified particular subjects with respect to which the attorney-in-fact was authorized to contract, none of which on their face involved arbitration. The Kentucky Supreme Court's holding that the instrument did not authorize entry into an arbitration agreement did not rest on anything that could remotely be characterized as an "express-reference rule," but instead was based on the court's conclusion that authority to enter into contracts with respect to "real and personal property, including stocks, bonds and insurance" did not confer authority to enter into a predispute arbitration agreement with a nursing home. Pet. App. 36a–38a.[6]

Kindred argues that the court's holding must reflect hostility to arbitration because an arbitration agreement relates to legal claims, and the Kentucky court acknowledged that, technically, "choses in action are personal

---

[6] The court also held that language empowering the attorney-in-fact to "institute legal proceedings" did not authorize a predispute arbitration agreement. Pet. App. 35a. Kindred does not appear to suggest that that straightforward interpretation conflicts in any way with the FAA.

property." *Id.* at 36a. Even as a technicality, Kindred's argument is deficient, because a claim that has not yet come into being is not property of any kind. *See Button v. Drake*, 195 S.W.2d 66, 69 (Ky. Ct. App. 1946) ("A chose in action has been defined as a personal right not reduced into possession, *but recoverable by a suit at law.*") (emphasis added). More importantly, the Kentucky court's decision reflects that the authority to enter into contracts concerning real and personal property is not reasonably understood to encompass an agreement that does not control any property rights, but instead impairs important procedural rights in possible future litigation. Kindred's argument does nothing to establish that that interpretation reflects a principle of law that poses an obstacle to arbitration. Not every difference of opinion over the interpretation of a legal instrument presents a substantial issue of federal law under the FAA.

2. **The Kentucky court's interpretation of the Clark power of attorney is fully consistent with the FAA's fundamental policy that arbitration is a matter of consent.**

Kindred's arguments with respect to the Clark power of attorney are no more persuasive in conjuring up an obstacle to the FAA's purposes. The Kentucky court stated that although the Clark instrument's generic language conferring broad authority to enter into contracts and take other actions might literally encompass an arbitration agreement (or, indeed, anything else in the world that a person might do), "[t]here are limits to what we will infer from even the broadest grants of authority that might be stated in a power-of-attorney instrument." Pet. App. 41a. The court held that it must "limit[] the tolerable range of inferences we would allow from such a universally broad grant." *Id.*

Accordingly, the court held that it was not reasonable to infer a grant of the power to enter into a predispute arbitration agreement or other similarly consequential agreements in the absence of some more explicit expression of that authority. The decision is entirely in accord with the generally applicable, neutral principles of agency law that an agent's authority extends to what the agent would reasonably understand to be within the scope of authority inferable from the principal's manifestations of intent, and that the consequences of a particular transaction must be considered in determining whether that transaction reasonably fits within the expectations and intentions of the principal. *See* Restatement (Third) of Agency § 2.02 & comment h.

Even if the decision were properly understood as creating an "explicit-reference rule" that treated authority to enter into arbitration agreements differently from authority to enter into other agreements comparable in terms of their effect on the principal's interests, it would pose no genuine obstacle to achievement of the FAA's objectives. As explained above, the fundamental policy of the FAA is the enforcement of *consensual* arbitration agreements: "Arbitration under the Act is a matter of consent, not coercion." *Volt*, 489 U.S. at 479. Far from being an obstacle to that policy, the Kentucky court's construction of the Clark power of attorney directly advances it.

The consent principle in the typical case involving a bilateral contract personally executed by the party against whom enforcement is sought is straightforward: If the contract applies to the dispute at issue, meets general contractual requisites such as consideration, and is not subject to any contractual defense against enforcement, it will be "enforced according to [its] terms." *Id.* at

479. That principle does not, and indeed cannot, require arbitration under a contract that says nothing about arbitration. After all, the FAA requires only enforcement of a "written provision" to arbitrate. 9 U.S.C. § 2. This Court has not, to our knowledge, required a party to arbitrate under a contract that was *silent* with respect to arbitration.

As this Court stated in *Granite Rock*, all of the Court's opinions have "compelled arbitration of a dispute only after the Court was persuaded that the parties' arbitration agreement was validly formed and that it covered the dispute in question and was legally enforceable." 561 U.S. at 300. *Granite Rock* reflects this Court's insistence that "policy considerations" cannot serve "as a substitute for party agreement" to arbitrate, as well as recognition that the FAA's policies can require arbitration only when "arbitration of a particular dispute is what the parties intended because their *express* agreement to arbitrate was validly formed." *Id.* at 303 (emphasis added).

At most, the Kentucky court's construction of the Clark power of attorney simply applies agency-law principles to achieve the same ends as the FAA's own prerequisite of an express written agreement to arbitrate—that is, to ensure that binding a party to arbitrate reflects his or her actual assent to the substitution of arbitral procedures for the due process, right to a jury, and access to the courts that otherwise are required for resolution of a legal claim. Absent such assent, arbitration would threaten to become a matter of coercion, not consent. Far from frustrating the FAA's policies, therefore, the decision below advances them.

To be sure, the effect of the court's decision in this case is to deny arbitration of this particular claim. But

there is no reason to believe that the agency-law principles applied by the Kentucky court would in some systemic way frustrate the pro-arbitration policies of the FAA (and of Kentucky's own arbitration laws). Should Kentuckians perceive that it is in their interests to enter predispute arbitration agreements in situations such as those at issue here, they can easily authorize such agreements in powers of attorney, and the decision below recognizes that resulting arbitration agreements would be enforceable under both the FAA and Kentucky law. To the extent, however, that such authorization is withheld, the FAA can provide no basis for effectively requiring that it be provided. Fear that people may not voluntarily assent to allow arbitration agreements to be entered into on their behalves is no reason for forcing them to arbitrate against their expressed wishes under a statute whose premise is that arbitration is a "matter of consent, not coercion." *Volt*, 489 U.S. at 479.

The suggestion that the Kentucky court's agency analysis is an intolerable obstacle to the objectives of the FAA also overlooks that this Court itself has found plain-statement requirements to be *implicit in federal law* where necessary to avoid arbitration of matters that parties would not reasonably have thought would be subject to arbitration. In *Wright v. Universal Maritime Service Corp.*, for example, the Court held that an arbitration agreement negotiated on a worker's behalf by his collective bargaining representative could not require arbitration of federal statutory claims absent a "clear and unmistakable" provision requiring arbitration. 525 U.S. 70, 80 (1998). The Court reasoned that the "right to a judicial forum" was of "sufficient importance" that the Court could not "infer from a general contractual provision" an intent to waive it. *Id.* The Court's subsequent decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258–59 (2009),

reaffirmed *Wright* and made plain that its clear-statement requirement for collective-bargaining-agreement waivers of judicial forums for statutory claims was consistent with the FAA, which the Court held to be applicable to arbitration requirements in collective bargaining agreements.

Similarly, in a line of decisions including *First Options*, 514 U.S. at 944, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 78 (2010), the Court has held that agreements to arbitrate questions of arbitrability must be "clear and unmistakable" to be enforced, even though such agreements fall within the scope of the FAA's prescription that "written provisions" to arbitrate disputes are enforceable. *See Rent-A-Center*, 561 U.S. at 70–71. The Court imposed this requirement to give effect to the FAA's central policy of consent, because absent a clear and unmistakable agreement to arbitrate arbitrability, compelling arbitration of such issues could "force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945.

These decisions illustrate that, although it incorporates policies favoring arbitration, the FAA—like legislation generally—does not "pursue[] its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). More particularly, they illustrate that when the policy of advancing arbitration collides with the policy of protecting parties against arbitrating when they never consented to do so, the latter policy prevails, and may justify adoption of interpretive principles designed to protect parties' reasonable expectations that they will not be coerced to arbitrate against their will.

The Kentucky Supreme Court's decision, of course, did not require anything close to the unmistakable clarity required by this Court in the circumstances of *Wright* and *First Options*. The point is simply that those decisions underscore that there is nothing fundamentally contrary to the FAA's policies in the Kentucky court's relatively modest holding that agency law principles do not permit the inference that a particular individual intended to confer power to agree to arbitration under a generally worded power of attorney that was silent on the subject. Rather, the court's holding is fully consistent with the FAA's fundamental principle of consent and its corollary that "unwilling parties" should not be forced to arbitrate in circumstances where they "reasonably would have thought" they had not expressed assent to arbitrate. *First Options*, 514 U.S. at 945.

Kindred's view of implied preemption in this case reflects a mistake common to expansive obstacle-preemption arguments: Kindred's attempt "to divine the broader purposes of the statute before it inevitably leads it to assume that Congress wanted to pursue those policies 'at all costs'—even when the text reflects a different balance." *Wyeth v. Levine*, 555 U.S. at 601 (Thomas, J., concurring in the judgment). So, here, Kindred's arguments elevate the FAA's pro-arbitration policies over its fundamental principle of consent, and thereby seek to bootstrap the Act's requirements that contracts be enforced into regulations of a state's application of principles governing the scope of an agent's authority to contract. A more complete understanding of the Act's purposes and policies, as well as the limitations of its textual commands, requires the conclusion that Kindred's implied preemption argument falls far short of demonstrating a manifest congressional intent to preempt the decisional principles applied below.

CONCLUSION

This Court should affirm the judgment of the Supreme Court of Kentucky.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

January 2017